No. 93-180-CFX
Status: GRANTED

Title: Boca Grande Club, Inc., Petitioner
v.
Florida Power & Light Company, Inc.

Docketed:
August 4, 1993

Court: United States Court of Appeals for the Eleventh Circuit

Counsel for petitioner: Rinard,Jack Coleman

Counsel for respondent: Markman,Stewart C., Yerrid,C. Steven, Knopik,Christopher S.

Entry	Date	Note	Proceedings and Orders
1	Aug 4 1993	G	Petition for writ of certiorari filed.
2	Aug 27 1993		Brief of respondent Florida Power & Light Company, Inc in opposition filed.
3	Sep 1 1993		DISTRIBUTED. September 27, 1993
4	Sep 28 1993		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, November 9, 1993. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 7, 1993. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, December 21, 1993. Rule 29 does nt apply.
			**********
5	Nov 4 1993		Joint appendix filed.
6	Nov 5 1993		Brief of petitioner Boca Grande Club, Inc. filed.
8	Nov 8 1993		Brief amicus curiae of National Assn.of Securities and Commercial Law Attorneys filed.
7	Nov 9 1993		Brief amicus curiae of Maritime Law Association of the United States filed.
10	Nov 18 1993		CIRCULATED.
9	Nov 22 1993		SET FOR ARGUMENT TUESDAY, JANUARY 11, 1994. (2ND CASE).
11	Nov 24 1993	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
12	Dec 6 1993	X	Brief of respondent Florida Power & Light Co., Inc. filed.
13	Dec 6 1993	X	Brief amicus curiae of United States filed.
16	Dec 6 1993		Record filed.
		*	Original record proceedings U.S. Court of Appeals, Eleventh Circuit and U.S. District Court, M.Dist. Ga. (BOX)
14	Dec 7 1993	X	Brief amici curiae of Arthur Andersen & Co., et al. filed.
15	Dec 13 1993		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
17	Dec 21 1993	X	Reply brief of petitioner filed.
18	Jan 11 1994		ARGUED.

93-180

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
Lau, Lane, Pieper, Conley & McCreadie, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

ATTORNEYS FOR BOCA GRANDE CLUB, INC., PETITIONER

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QUESTION PRESENTED

SHOULD THIS COURT EXERCISE ITS JURISDICTION AND RESOLVE THE CONFLICT CREATED BY THE ELEVENTH CIRCUIT COURT OF APPEALS AND ENFORCE THE RULE APPLIED IN ALL OTHER CIRCUITS IN MARITIME CASES THAT SETTLEMENT BETWEEN A JOINT TORTFEASOR AND A PLAINTIFF BARS ALL CLAIMS FOR CONTRIBUTION BY NON-SETTLING TORTFEASORS AGAINST THE SETTLING TORTFEASOR?

LIST OF PARTIES

The parties to the proceeding sought to be reviewed are Petitioner, Boca Grande Club, Inc., and Respondent, Florida Power & Light Company. The parent of Petitioner is Great American Insurance Company.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1992

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

Boca Grande Club, Inc., petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on May 12, 1993.

OPINIONS BELOW

The opinions below are:

1. Opinion of May 12, 1993 of the United States Court of Appeals for the Eleventh Circuit, *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (llth Cir. 1993). (Appendix A1).

2. Order dated March 26, 1992 of the United States District Court for the Middle District of Florida, Tampa Division. (Appendix A2).

JURISDICTION

The opinion and judgment sought to be reviewed were entered on May 12, 1993. This Petition for Writ of Certiorari has been filed within ninety days of the entry of said opinion and judgment. This Court's jurisdiction is invoked under 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS

"The judicial Power shall extend ... to all Cases of admiralty and maritime Jurisdiction ..." U.S. Const. Art. III, Sec. 2, cl.1.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Middle District of Florida, was based upon 28 U.S.C. §1333, 46 U.S.C. §181, *et seq.* and Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims.

B. Procedural History.

In June 1988 a law suit was commenced against Boca Grande Club, Inc. (hereinafter "Boca Grande Club") and Florida Power & Light Company (hereinafter "FP&L") in connection with a collision between a sailboat and a high power electric line designed, constructed, owned and maintained by FP&L. The collision occurred on April 23, 1988 in the navigable waters of the United States.

The sailboat was owned by Boca Grande Club and had been rented to Robert Polackwich, a club member. Robert Polackwich and Jonathan Richards, his stepson, were operating the sailboat at the time of collision and both were electrocuted.

The personal representatives of Robert Polackwich and Jonathan Richards, and other parties, (all hereinafter collectively referred to as "Decedents") started an action in state court for wrongful death. Following commencement of the action in state court, Boca Grande Club initiated an action for limitation of liability in October, 1988 in the United States District Court, Middle District of Florida, Tampa Division. A claim for indemnity and con-

tribution was filed in the limitation action by FP&L. Claims against Boca Grande Club were also filed in the limitation action on behalf of the Decedents and a claim for indemnity and contribution was filed by O'Day Corporation, the manufacturer of the sailboat.

In December, 1989 FP&L served a third party complaint against Boca Grande Club in the state court action initiated by Decedents. Boca Grande Club responded by filing a motion for an injunction in United District Court. In February, 1990 the district court entered its order enjoining the prosecution of claims against Boca Grande Club in any proceeding other than the limitation action. (Appendix A9).

In June, 1990, Boca Grande Club filed a motion in the limitation action seeking summary judgment as to all the claims pending in the limitation case. Thereafter, Boca Grande Club and the Decedents worked out a settlement of all claims filed by the Decedents in the limitation action and entered into a General Release. (Appendix A11). In December, 1990, Boca Grande Club and the Decedents filed a stipulation and joint motion seeking dismissal of all of Decedent's claims filed in the limitation action. (Appendix A21). In March, 1991, the district court granted the joint motion and dismissed all of the Decedent's claims. (Appendix A24). In April, 1991, Boca Grande Club filed another motion which sought summary judgment as to the indemnity and contribution claims of FP&L and the boat manufacturer, the only claims left in the limitation case. In March, 1992, the district court granted summary judgment on the indemnity and contribution claim of FP&L and administratively closed the file pending the outcome of bankruptcy proceedings involving the boat builder. (Appendix A5). The court entered judgment in favor of Boca Grande Club following its order granting summary judgment and in April, 1992 FP&L appealed to the United States Court of Appeals for the Eleventh Circuit. The summary judgment granted to Boca Grande Club by the district court was reversed by the Eleventh Circuit Court of Appeals on May 12, 1993. (Appendix A1).

REASONS FOR GRANTING THE WRIT

The Writ of Certiorari sought by Petitioner should be granted for the following reasons:

1. To resolve the conflict existing between the Eleventh Circuit Court of Appeals and other federal circuits and require the Eleventh Circuit to apply the rule of maritime law that bars litigation of claims for contribution against a joint tortfeasor that has settled with a plaintiff.

2. To restore uniformity in the application of maritime law in federal and state courts in the Eleventh Circuit.

3. To restore settlement as a viable means of resolving multi-party maritime law suits in the federal courts of the Eleventh Circuit.

In *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (llth Cir. 1987), *cert. denied* 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988) (hereinafter "*Self*") the Eleventh Circuit, consistent with other federal circuits that have considered the question, adopted the rule that a settlement with a plaintiff bars claims for contribution by joint tortfeasors against the settling defendant. Following remand the district court applied the settlement bar rule announced in *Self. Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 1990 AMC 2247 (M.D. Fla. 1990). Thereafter the case, which involved a collision between a tank ship and a dredge, came before the Eleventh Circuit a third time. The court held that it had not adopted a settlement bar rule in *Self* and proceeded to declare, contrary to the rules theretofore applied in other federal courts in maritime cases, that when one tortfeasor settles with a plaintiff the contribution claims of non-settling defendants remain fully viable and can be litigated against the settling defendant. *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575, 1582-1583 (llth Cir. 1992), *cert. denied* ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992) (hereinafter "*Great Lakes*").

Relying on its decision in *Great Lakes* the Eleventh Circuit

reversed the summary judgment that had been entered in favor of Boca Grande Club and repeated that "under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." *Boca Grande Club Inc. v. Polackwich*, 990 F.2d 606, 607 (11th Cir. 1993) (hereinafter "*Polackwich*"). (Appendix A2).

The rule adopted by the Eleventh Circuit in *Great Lakes* and applied in *Polackwich* is in direct conflict with settlement bar rules applied by other circuits in maritime cases, fails to adhere to the principle of uniformity in maritime law, ignores the policy of this Court and general law which favors settlement, effectively extinguishes settlement as a means of resolving maritime claims in federal courts in the Eleventh Circuit and promotes conflict between state and federal courts within the Eleventh Circuit. By exercising jurisdiction in this case and fulfilling its constitutionally mandated duty as an admiralty court, this Court can correct the conflicts as well as restore rationality, certainty and uniformity to this area of maritime law. *McDermott International, Inc. v. Wilander*, 498 U.S. ___ 111 S.Ct. 807, 112 L.Ed.2d 866 (1991).

In deciding what effect settlement is to have upon claims for contribution courts usually discuss three alternatives or options. The first permits non-settling tortfeasors to litigate their contribution claims against a settling defendant. This option favors continued litigation and is hostile to settlement. This is the option chosen by the Eleventh Circuit. The second alternative bars claims for contribution against settling defendants. This option permits a plaintiff to settle a portion of his claim and make the settlement final as respects the settling defendant. This option has the salutary effect of terminating litigation between the plaintiff and the settling defendant as well as the settling defendant and non-settling defendants on pending claims for contribution. The third option eliminates contribution by reducing the plaintiff's claim by the pro rata portion of the liability of the settling defendant. From this option flow the same beneficial results as are achieved by the second alternative; namely, certainty of result, promotion of settlement and termination of litigation. See: *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989).

The second and third options permit a defendant to make his peace, avoid risk of trial and the potential for being found liable for damages greater than the settlement amount and to stop litigation expenses. The alternative selected by the Eleventh Circuit promotes litigation and is contrary to the philosophy of the Federal Rules of Civil Procedure, Rules 1 and 68, as well as the general policy of the law and of this Court, which favors settlement. *Marek v. Chesney*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed.2d 287 (1981) (Powell, J. concurring). "The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto" *Pfizer, Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972), *cert. denied* 406 U.S 976, 92 S.Ct. 2411, 32 L.Ed.2d 676 (1972).

Nothing in this Court's opinions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 104, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), or *Edmonds v. Compagnie Generale Transatlantiqe*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) require, nor is there anything in general maritime law that mandates, utilization of the federal district courts and courts of appeal to fine tune allocations of fault between settling and nonsettling defendants or to second guess the decision of a plaintiff to settle a case. There is nothing contained in these three opinions that would inhibit the selection of alternatives two or three as the means of disposing of claims for contribution against a settling tortfeasor. Moreover, it is submitted that *Cooper*, *Reliable* and *Edmonds* do not support the proposition that nonsettling tortfeasors should be permitted to litigate claims for contribution against a settling defendant.

The Eleventh Circuit Court of Appeals stands alone in holding that a settling defendant must continue to defend himself against contribution claims brought by non-settling tortfeasors. Courts in the Second, Fifth, Eighth and Ninth Circuits, when confronted with the three alternatives on contribution claims, have all opted for a rule which bars further prosecution of contribution claims, or which makes contribution unnecessary.

The decisions of the Eleventh Circuit Court of Appeals in *Polackwich* and *Great Lakes* are in direct conflict with decisions in the Second, Fifth, Eight and Ninth Circuits. In *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp 218 (S.D.N.Y. 1991) a settlement bar rule was adopted by the district court. Decisions in the Fifth Circuit differ as to how the proceeds of a settlement are to be applied against a plaintiff's claim but are uniform in holding that settlement bars claims for contribution. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); *Rowland v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242, 117 L.Ed.2d 474 (1992), *Hernandez v. N/V Rajaan*, 841 F.2d 582 (5th Cir. 1980) *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988). In *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F. 2d 1266 (8th Cir. 1991), the Eighth Circuit Court of Appeals adopted a settlement bar rule and criticized the position ultimately adopted by the Eleventh Circuit which preserves the right to litigate contribution claims after settlement. The rule adopted by the Eleventh Circuit in *Great Lakes* and applied in *Polackwich* was criticized at length by the Ninth Circuit Court of Appeals in *Miller v. Christopher*, 887 F.2d 902, 906-907 (9th Cir. 1989), where the court adopted a settlement bar rule and pointed out that, theretofore, no admiralty court had implemented a rule that kept contribution claims alive against a settling defendant. *See, In Re The Glacier Bay*, 1993 AMC 1530 (D. Alaska 1993) (*Great Lakes* rejected in favor of settlement bar rule.)

Great Lakes has already led to conflict between the law to be applied in maritime cases in federal and state courts within the Eleventh Circuit. Two days after the Eleventh Circuit entered its opinion reversing the summary judgment in favor of Boca Grande Club and remanding the case for further proceedings in Tampa, the Supreme Court of Alabama refused to follow the rule adopted by the Eleventh Circuit in *Great Lakes* and affirmed a summary judgment in favor or a settling defendant on claims for contribution by nonsettling defendants. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, ___ So.2d ___, 61 U.S.L.W. 2745 (Ala. 1993). (Appendix A27). (Because a motion for rehearing has been filed, the Supreme Court of Alabama has not yet

released its opinion for publication. An unofficial slip copy of the opinion is contained in the Appendix to this Petition.)

The fundamental facts in *Amerada Hess* are no different than those in the instant case. In both a joint tortfeasor settled claims with the plaintiff, obtained a release, and then received summary judgment in its favor on the pending contribution claims of the non-settling defendants. Thus, a defendant in a maritime case being prosecuted in a state court in Alabama may safely enter into a settlement with the plaintiff and terminate all litigation against him. By contrast, in an identical maritime case pending in the United States District Court in Tampa, or Mobile, or Savannah, a defendant could not, by making peace with the plaintiff, escape from the law suit and its attendant expenses. The district courts in the Eleventh Circuit will be required to continue to deal with contribution claims against the settling defendant.

In its opinion the Supreme Court of Alabama found the reasoning of the Eleventh Circuit in *Great Lakes* to be flawed and noted that it was not obligated to follow the ruling of lower federal courts and pointed out that this is especially so when the lower federal courts are in conflict themselves as to what rule applies. (Appendix A45). Will it be long before the high courts in other states within the Eleventh Circuit follow the lead of the Supreme Court of Alabama in rejecting *Great Lakes* and establish settlement bar rules? Or will some of those courts opt to apply the Eleventh Circuit rule and create further disharmony? Only this Court can cure the conflict and restore uniformity and certainty.

In its opinion in *Great Lakes* the Eleventh Circuit was disingenuous as to the effect its rejection of a settlement bar rule would have upon the settlement of maritime cases. The Court assumed that permitting actions for contribution to continue against settling defendants would have "a slight disincentive effect upon settlements." 957 F.2d at 1582. Absent extraordinary circumstances there will be no incentive whatsoever for a joint tortfeasor to ever settle a maritime claim if he remains exposed to contribution. At some point in the lawsuit the proportional fault of the settling tortfeasor will be determined. How could such party not remain in the

action and continue to defend himself from efforts of the plaintiff and co-defendants to establish his share of liability? It would be foolhardy for a defendant to settle in a typical maritime case under the rule adopted by the Eleventh Circuit. Instead of being a "slight disincentive" the *Great Lakes* rule will destroy settlement as a means for resolving maritime disputes in federal courts in the Eleventh Circuit.

In *Great Lakes* the Eleventh Circuit wholly ignores the advantage settlement has to a plaintiff. The instant case is an excellent example. By settling all of their claims with Boca Grande Club the Decedents avoided trying their cases for wrongful death before a judge without jury in a limitation action. Boca Grande Club would have had no incentive to settle the claims with the Decedents if it knew that it would nevertheless remain in the case for the ultimate assessment of its proportional fault for the casualty and for the contribution claims of FP&L and O'Day Corporation to be adjudicated. In short, the plaintiffs in this case would never have been able to escape non-jury adjudication of their wrongful death claims.

The only rule that will preserve the principles of compromise of maritime claims and uniformity in admiralty law is a rule that bars prosecution of contribution claims against settling parties.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition and exercise its jurisdiction to resolve the conflict created by the United States Court of Appeals for the Eleventh Circuit and enforce the rule applied in other circuits in maritime cases that settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by non-settling tortfeasors against the settling tortfeasor.

Respectfully submitted,

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
Lau, Lane, Pieper,
Conley & McCreadie, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

ATTORNEYS FOR BOCA GRANDE CLUB, INC., PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
Lau, Lane, Pieper, Conley & McCreadie, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

ATTORNEYS FOR BOCA GRANDE CLUB, INC., PETITIONER

CONTENTS OF APPENDIX

In the Matter of the Complaint of BOCA GRANDE CLUB, INC., for exoneration from or limitation of liability as owner of a 16' Prindle catamaran sailing vessel hull no. SUR06214M82E,
Plaintiff-Counterclaim defendant-Counterclaim plaintiff-Appellee,

v.

Alan POLACKWICH, Robert Polackwich, Jonathan Richards, Alphonsus J. Polackwich and Eleanor A. Polackwich, Defendants-Counterclaim plaintiffs,

Stephanie Polackwich, as personal representative of the Estate of Jonathan Richards, Defendant-Counterclaim plaintiff-Crossclaim defendant,

O'Day Corporation, Defendant-Counterclaim plaintiff-Crossclaim plaintiff-Crossclaim defendant,

Florida Power & Light Company, Inc., Defendant-Counterclaim plaintiff-Crossclaim defendant-Crossclaim plaintiff-Counterclaim defendant-Appellant.

No. 92-2391.
United States Court of Appeals,
Eleventh Circuit.
May 12, 1993.

Stuart C. Markman, Kynes & Markman, Tampa, FL, for appellant.

Jack C. Rinard, David F. Pope, Tampa, FL, for appellee.

Appeal from the United States District Court for the Middle District of Florida, William J. Castagna, Judge.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

PER CURIAM:

In this case, the district court, invoking the settlement bar rule suggested by *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (llth Cir.1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), rejected Florida Power & Light Company's (FP & L's) claim for contribution against Boca Grande Club, Inc. (Boca Grande) and gave Boca Grande summary judgment. After judgment was entered and this appeal was taken, *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (llth Cir.), cert. denied, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992), concluded that the issue of contribution was not before the court in *Self*, and held that, under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled. *Id.* at 1578, 1582-83. Accordingly, we must vacate the district court's ruling and remand the case for further proceedings. In doing so, we do not pass on Boca Grande's argument that we should affirm the district court's summary judgement because, on the record before us, FP & L is not entitled to contribution.

VACATED and REMANDED for further proceedings.

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

No. 92-2391

District Court No. 88-1636-CIV

IN THE MATTER OF THE COMPLAINT OF BOCA GRANDE CLUB, INC., for exoneration from or limitation of liability as owner of a 16' Prindle catamaran sailing vessel hull no. SUR06214M82E,

Plaintiff-
Counterclaim defendant-
counterclaim Plaintiff-
Appellee,

versus

ALAN POLACKWICH, ROBERT POLACKWICH, JONATHAN RICHARDS, ALPHONSUS J. POLACKWICH, and ELEANOR A. POLACKWICH,

Defendants-
Counterclaim Plaintiffs,

STEPHANIE POLACKWICH, as personal Representative of the Estate of Jonathan Richards,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant,

O'DAY CORPORATION,

Defendant-
Counterclaim Plaintiff
Crossclaim Plaintiff-
Crossclaim Defendant,

FLORIDA POWER & LIGHT COMPANY, INC.,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant-
Crossclaim Plaintiff-
Counterclaim Defendant-
Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

---

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Entered: May 12, 1993
For the Court: Miguel J. Cortez, Clerk
By: /s/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: JULY 15, 1993

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-1636-CIV-T-15A

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

ORDER

This action was brought by Boca Grande Club seeking limitation of liability for claims stemming from a maritime accident in which the mast of a sailboat struck a power line resulting in the deaths of two individuals. The estates of the deceased brought suit in state court against Florida Power and Light Corporation ("FPL") and the O'Day Corporation, the boat's manufacturer. Those defendants brought third party actions for contribution and indemnity against the Boca Grande Club which owned and leased the sailboat to the decedents. In response, Boca Grande brought this action.

Subsequent to the institution of this action, Boca Grande entered into settlement agreements with the decedents' estates. In its motion for summary judgment Boca Grande asserts that those settlement agreements bar FPL's claim for contribution and indemnity.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In reaching a summary judgment decision the court must view the facts in the light most favorable to the non-moving party. *United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (llth Cir. 1990).

Initially, the Court notes that FPL concedes that its claim for indemnity is barred as a matter of law. Accordingly, the only issue remaining before this Court is whether FPL's contribution claim is likewise barred.

The parties agree that this is an action invoking the maritime jurisdiction of this Court. Accordingly, maritime law of the Eleventh Circuit provides the applicable substantive law. Under the current case law, a joint tortfeasor is barred from seeking contribution from a settling joint tortfeasor and the plaintiff may recover the full amount of damages, minus the amount received from the settling defendant, from the remaining tortfeasors. *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (llth Cir. 1987), *cert. denied* 486 U.S. 1033 (1988).

FPL recognizes that the settlement bar exists, yet argues that the bar is only applicable if the settlement was entered in good faith. FPL argues that at least one other circuit has adopted a good faith requirement, see *Miller v. Christopher* (887 F.2d 902 (9th Cir. 1989), and §886A of Restatement (Second) of Torts suggests that a good faith requirement may be warranted. However, the Eleventh Circuit has neither accepted or rejected a good faith requirement. *See Self*, 832 F.2d at 1547.

This Court declines to impose a good faith requirement where previously none existed. Accordingly, it is ORDERED:

1. Boca Grande's motion for summary judgement as to the claims of Florida Power and Light Company (D-174) is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estates of the decedents.

2. The Clerk is directed to administratively close this file pending the outcome of the bankruptcy proceedings currently underway for defendant O'Day Corporation.

3. Boca Grande Club, Inc. is directed to report to the Court upon the conclusion of the O'Day Corporation's bankruptcy proceedings.

DONE AND ORDERED at Tampa, Florida this 26th day of March, 1992.

/s/_____
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

United States District Court
MIDDLE DISTRICT OF FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-1636-Civ-T-15A

IN THE MATTER OF THE COMPLAINT OF

BOCA GRAND CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR062l4M82E

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Boca Grande's Motion for Summary Judgement as to the claims of Florida Power and Light Company is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estate of the decedents.

March 27, 1992
Date

David L.Edwards
Clerk
/s/ _____
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E.

ORDER ON MOTION FOR INJUNCTION
and
INJUNCTION

The matter came before the Court upon Plaintiff's motion for an injunction against the filing, commencement and prosecution of any claims whatsoever against Plaintiff outside of this limitation proceeding. It appears from Plaintiff's motion and the court file in this case that Plaintiff has duly filed its complaint claiming the benefit of Title 46, United States Code, Sections 181 *et seq*, as amended, which provides for the exoneration or limitation of liability of vessel owners. Plaintiff specifically claims the benefits of exoneration or limitation as the owner of a 16' Prindle Catamaran Sailboat in connection with a casualty occurring on the navigable waters of Gasparilla Pass on April 23, 1988.

With its Complaint Plaintiff elected to file an a*d interim stipulation,* with interest, in the amount of Plaintiff's interest in the 16' Prindle Catamaran Sailboat following the casualty. Plaintiff has also filed a separate stipulation for costs. In addition Plaintiff has filed an affidavit as to the value of its interest in the aforesaid sail-

boat. By filing the appropriate *ad interim stipulation* with interest together with the requisite stipulation for costs Plaintiff has fulfilled the requirements of 46 U.S.C. §185 and Rule F(l), Supplemental Rules for Certain Admiralty and Maritime Claims. Accordingly, Plaintiff is entitled to the injunction provided by 46 U.S.C. §185 and Supplemental Rule F(3) and it is therefore -

ORDERED as follows:

1. Plaintiff's motion for entry of an injunction be and the same is hereby granted.

2. The further prosecution of any pending actions, suits or legal proceedings in any court whatsoever, including the consolidated cases brought by the Estates of Claimants Jonathan Richards and Robert J. Polackwich pending in the Fifteenth Judicial Circuit Court in Palm Beach County bearing Case No. CL 89-9670 AH, and the institution and prosecution of any suits, actions or legal proceedings of any nature or description whatsoever in any court wheresoever, except in this proceeding for Exoneration from or Limitation of Liability, against Plaintiff in respect of any claim arising out of or connected with the casualty occurring upon the navigable waters of Gasparilla Pass on April 23, 1988 be, and the same are hereby, stayed, enjoined and restrained until the hearing and determination of this proceeding and the further Order of this Court.

3. Plaintiff shall serve by certified Mail a copy of this order upon each person or firm, or their attorneys, who have filed claims in this limitation proceeding. Plaintiff shall also cause to be filed a certified copy of this Order in any court in which any claims against Plaintiff are pending.

DONE AND ORDERED at Tampa, Florida, on this 23rd day of February, 1990.

/s/_____
United States Magistrate

FULL AND COMPLETE GENERAL RELEASE

WHEREAS, on April 23, 1988, Robert J. Polackwich, M.D. and Jonathan Richards were in an accident on the navigable waters adjacent to Boca Grande, Florida; and

WHEREAS, as a result of said accident, Robert J. Polackwich, M.D. and Jonathan Richards died; and

WHEREAS, as a result of the deaths of Robert J. Polackwich, M.D. and Jonathan Richards, representatives of their respective estates filed lawsuits in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, against Boca Grande Club, Inc., and other defendants; and

WHEREAS, as the result of the accident which involved a 16' Prindle Catamaran owned by Boca Grande Club, Inc., Boca Grande Club, Inc. commenced an action in United States District Court, Middle District of Florida, Tampa Division, seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §181 et seq; and

WHEREAS, the representatives of the estates of Robert J. Polackwich, M.D. and Jonathan Richards, and others (all of whom are hereinbelow identified as "Claimants") filed claims in the limitation of liability action pending in United States District Court; and

WHEREAS the Plaintiffs in the actions pending in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, and all of those who have filed claims for damages for the deaths of Robert J. Polackwich, M.D. and Jonathan Richards in the limitation action pending in United States District Court, Middle District of Florida, Tampa Division, desire to settle all of their claims against Boca Grande Club, Inc. and its vessel;

ACCORDINGLY, KNOW ALL MEN BY THESE PRESENTS:

Receipt of the sum of Two Hundred Twenty Five Thousand and No/100 Dollars ($225,000.00) lawful money of the United States to them in hand paid by Boca Grande Club, Inc., is hereby acknowledged by:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of the estate of Eleanor A. Polackwich, Deceased.

All of the foregoing individuals are hereinafter collectively referred to as "Claimants."

Claimants further acknowledge receipt of the aforesaid sum of money as total consideration for any and all claims by Claimants against the Released Parties only. Claimants have released, remised, acquitted and forever discharged, and by this Full and Complete General Release do release, remise, acquit and forever discharge only Boca Grande Club, Inc., and its successors and assigns, and the 16' Prindle Catamaran Sailing Vessel Hull No.

SUR06214M82E, together with its owner, charterer, operator, crew and insurers, collectively hereinafter referred to as the Released Parties, of and from all manner of actions, torts, injuries, causes of action, damages, contracts, claims, costs, expenses and demands whatsoever in law, in equity, in admiralty or otherwise, which Claimants, individually, jointly, severally or any of them, ever had, now have, or hereafter can, shall or may have against the Released Parties only upon, by reason of, or in any way growing out of any matter whatsoever arising from the injury and deaths of Robert A. Polackwich, M.D., and Jonathan Richards while aboard the 16 Catamaran Sailing Vessel on April 23, 1988.

This Full and Complete General Release as to the Released Parties only includes any claim by Claimants against the Released Parties only for any and all injuries, loss and damage, known or unknown, directly or indirectly sustained or suffered by Claimants, individually, jointly, severally, or any of them, arising out of or connected with a collision between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and power lines crossing the navigable waters of Gasparilla Pass, including the rental from Boca Grande Club, Inc., usage, or operation of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E on April 23, 1988, for which claims have been made against the Released Parties only in those certain lawsuits now pending in United States District Court, Middle District of Florida, Tampa Division, and the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, which cases are, respectively, styled as:

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT
OF
BOCA GRANDE CLUB, INC. FOR

EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, STATE OF FLORIDA, IN AND FOR PALM BEACH COUNTY, FLORIDA, CIVIL DIVISION

Case No. CL89-9670 AH

STEPHANIE J. POLACKWICH, as Personal Representative
of the Estate of JONATHAN RICHARDS, deceased,
Plaintiff,
vs.
FLORIDA POWER AND LIGHT COMPANY, O'DAY CORPORATION, PRINDLE CATAMARAN, INC., SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE, LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

ALAN S. POLACKWICH, SR., as Personal Representative
of the Estate of ROBERT J. POLACKWICH, deceased,
Plaintiff,
vs.
FLORIDA POWER AND LIGHT COMPANY, O'DAY CORPORATION, PRINDLE CATAMARAN, INC., SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE, LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

Claimants do hereby consent and agree that all of their claims and complaints against the Released Parties only made and outstanding against the Released Parties only in the aforementioned lawsuits shall be forthwith dismissed with prejudice. This Full and Complete General Release as to the Released Parties only does not in any way release or discharge FLORIDA POWER AND LIGHT COMPANY, O'DAY CORPORATION, PRINDLE CATAMARAN, INC., SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE, LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR PUNTA CORPORATION, or their insurers. Claimants hereby specifically reserve all of their claims and actions against said parties, and nothing contained in this Full and Complete General Release shall be construed or deemed to be a release of Claimants' claims and actions against any of said parties.

It is expressly understood and agreed that the acceptance of the aforesaid sum of money is in full accord and satisfaction of disputed claims by and between the parties to this settlement only, which claims are set out in the above identified lawsuits and that the payment of the aforesaid sum is not an admission of liability on the part of the Released Parties, each of whom expressly denies liability.

In further consideration of the aforesaid sum of money being paid to Claimants, Claimants, and each of them, do hereby covenant with and represent to the Released Parties that Claimants are the owners of the claims as to the Released Parties set forth in the above identified lawsuits.

In witness whereof, each of the Claimants hereinabove identified has executed this Full and Complete General Release as to the Released Parties only with effect as to each as and from the day nd date of their respective signatures.

/s/ _____
Alan S. Polackwich, Sr.

/s/ _____
Alan S. Polackwich, Sr. As
Personal Representative of the
Estate of Dr. Robert J. Polackwich

State of Florida
County of Indian River

Personally appeared Alan S. Polackwich, Sr., an individual well known to me, who upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Dr. Robert J. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11,1994
BONDED THRU GENERAL INS. UND.

/s/ _____
Stephanie J. Polackwich

/s/ _____
Stephanie J. Polackwich as mother and Natural Guardian of Robert Jamison Polackwich, a minor

/s/ _____
Stephanie J. Polackwich as Personal Representative of the estate of Jonathan Richards

State of Florida
County of Hillsborough

Personally appeared Stephanie J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Robert Jamison Polackwich and the personal representative of the estate of Jonathan Richards and that she signed the foregoing Full and Complete General Release individually and as mother and natural guardian of Robert Jamison Polackwich and as the personal representative of the estate of Jonathan Richards, and that she signed the said release in her individual and representative capacities with full authority to so act and that her signatures were her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 4th day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA.
MY COMMISSION EXPIRES: MAR. 20, 1994.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

/s/ _____
Trudy Bergund as mother and Natural Guardian of Nathan Polackwich, a minor

State of Florida
County of Indian River

Personally appeared Trudy Bergund, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Nathan Polackwich, a minor, and that she signed the above and foregoing Full and Complete General Release in her capacity as mother and guardian of Nathan Polackwich and that she is fully authorized to so act and her signature is her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3rd day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
Notary Public
State of Florida at Large
My Commission Expires Jan 20,1992

/s/ _____
Alphonsus J. Polackwich

/s/ _____
Alphonsus J. Polackwich as
Personal Representative of the
estate of Eleanor A. Polackwich

State of Florida
County of Indian River

Personally appeared Alphonsus J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Eleanor A. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11,1994
BONDED THRU GENERAL INS. UND.

Acceptance of Full and Complete General Release

Boca Grande Club, Inc., on behalf of the Released Parties, hereby accepts the above and foregoing Full and Complete General Release and acknowledges, accepts, and agrees to all of the provisions therein contained.

Boca Grande Club, Inc.

By: /s/ _____
Mary Keene, Manager

County of Charlotte
State of Florida

Personally appeared Mary Keene, an individual well known to me, who upon being duly sworn, deposed and said that she is the manager of Boca Grande Club, Inc. and that she acknowledges receipt of and accepts the above and foregoing Full and Complete General Release and she is fully authorized to execute the foregoing acceptance on behalf of Boca Grande Club, Inc.

Witness my hand and seal, this 6th day of May, 1991

/s/ _____
Notary Public, State of Florida

My commission expires:
NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: AUG. 27, 1993.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING
VESSEL, HULL NO. SUR06214M82E

STIPULATION AND JOINT MOTION FOR DISMISSAL

Boca Grande Club, Inc., Plaintiff, and
Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of the estate of Eleanor A. Polackwich, Deceased,

hereinafter referred to as Stipulating Claimants, do hereby stipulate and agree that the claims of each of the Stipulating Claimants against Boca Grande Club, Inc. filed in this proceeding have been amicably, fairly and reasonably resolved and settled provided the conditions stated below are met and do hereby jointly move the Court for entry of an order dismissing, with prejudice, the claims of each of the above Stipulating Claimants against the Plaintiff.

The settlement between Plaintiff and Stipulating Claimants is conditioned upon the stay of this limitation action as to the remaining claims until the actions in state court have been completed. Accordingly, Plaintiff and Stipulating Claimants do hereby jointly move the Court for an Order staying the further prosecution of this action until the presently pending actions in state court have been completed. Plaintiff and the Stipulating Claimants do further move that the Court provide in its Order of Dismissal that the case will be so stayed, except for motions for summary judgment to be hereafter filed by Plaintiff as to the remaining claims of Florida Power & Light Company and the 0'Day Corporation for indemnity and contribution.

The settlement between Plaintiff and the aforesaid Stipulating Claimants is also conditioned upon the Court's providing in its order of dismissal that the injunction heretofore entered by the Court in this proceeding be lifted as to the Stipulating Claimants. The order of dismissal should also specifically provide, that the injunction shall remain in full force and effect only as to any claims against Boca Grande Club, Inc.

The parties hereto further move the Court to provide in its order of dismissal that the Plaintiff and each of the Stipulating Claimants shall bear their own respective costs.

Stipulated and agreed on this 10 day of December, 1990.

MACFARLANE, FERGUSON,
ALLISON & KELLY
By: /s/ _____
Jack C. Rinard #095376
D. James Kadyk #238325
P.O. Box 1531
Tampa, FL 33601
Tel: 813/223-2411
Attorneys for Boca Grande Club, Inc.

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY
By:/s/_____
John A. Shipley
P.O. Drawer 3626
West Palm Beach
Florida 33401-3626
Tel: 407/686-6300
Attorneys for Settling Claimants

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-CIV-T-17A

IN THE MATTER OF THE COMPLAINT
OF
BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING
VESSEL, HULL NO. SUR06214M82E

ORDER

THIS CAUSE is before the Court upon the Stipulation and Joint Motion for Dismissal filed by Boca Grande Club, Inc., Plaintiff, and the following Stipulating Claimants in this case:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr., as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich, as personal representative of the estate of Jonathan Richards, Deceased

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich, as personal representative of the estate of Eleanor A. Polackwich, Deceased.

The Stipulation and Joint Motion for Dismissal was considered by the United States Magistrate Judge, pursuant to a specific order of referral, and the Magistrate Judge has filed his report recommending that all claims filed in this case by the Stipulating Claimants against the Plaintiff be dismissed with prejudice, subject to conditions that the Magistrate Judge recommends the Court approve.

Upon consideration of the report and recommendation of the Magistrate Judge and upon this Court's independent examination of the file, the Magistrate Judge's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED that:

1. The Joint Motion for Dismissal is GRANTED, and all claims of the Stipulating Claimants against the Plaintiff only are hereby dismissed with prejudice.

2. Further prosecution of this limitation action is hereby STAYED until the state court lawsuits have been terminated. The only exception to this stay is that Plaintiff may, within forty-five (45) days from the date of this Order, file motions for summary judgment as to the claims of Florida Power & Light Company and The O'Day Corporation which seek indemnity and contribution. Florida Power & Light Corporation and The O'Day Corporation will respond to any such motions filed by Plaintiff in accordance with the Local Rules of this Court.

3. The "Order on Motion for Injunction and Injunction" ("Injunction Order," doc. 55) entered by the United States Magistrate Judge on February 23, 1990 is hereby LIFTED as to each of the Stipulating Claimants and each Stipulating Claimant is free to pursue whatever actions he or she may have against parties other than Boca Grande Club, Inc. in other forums, including the action presently pending in the Fifteenth Judicial Circuit in Palm Beach County, Florida, Case No. CL 89-9670 AH. The Injunction Order remains in full force and effect only with respect to other

parties' or potential parties' actions, if any, against Boca Grande Club, Inc., as owner of 16' Prindle Catamaran Sailing Vessel and particularly with respect to the claims of parties in this action against Boca Grande Club, Inc. that have not been settled. The injunction remains specifically in effect as to claims by Florida Power & Light Company and The O'Day Corporation for indemnity and contribution. The injunction does not protect Florida Power & Light Company, The O'Day Corporation, or any party other than Boca Grande Club, Inc.

4. All pending discovery motions are hereby DENIED.

5. The entry of this Order does not make any determination as to the good faith of the settlement between the Plaintiff and the Stipulating Claimants.

6. Boca Grande Club, Inc. and each of the Stipulating Claimant shall bear their own respective costs.

DONE and ORDERED in Chambers at Tampa, Florida, this 13th day of March, 1991.

/s/ _____
UNITED STATES DISTRICT JUDGE
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

Slip Copy
61 USLW 2745
(Cite as: 1993 WL 154448 (Ala.))

NOT YET RELEASED FOR PUBLICATION.

AMERADA HESS CORPORATION, et al.

v.

OWENS-CORNING FIBERGLASS CORPORATION

AMERICAN TRADING TRANSPORTATION COMPANY, INC., et al.

V.

OWENS-CORNING FIBERGLASS CORPORATION.

1911251 and 1911252.

Supreme Court of Alabama.

05-14-93.

ADAMS, JUSTICE.

***1.** Amerada Hess Corporation; American Trading Transportation Company, Inc.; ARCO Marine, Inc.; Bermuth Lembcke Company, Inc.; Chevron U.S.A., Inc.; Chiquita Brands International, Inc.; Isbrandtsen Company, Inc.; Keystone Shipping Company; Marine Transport Lines; Marine Transport Management Company, Inc.; National Bulk Carriers; PACO Tankers, Inc.; Red Hills Corporation; United Brands Company; Unocal; and Warren Petroleum Company (all hereinafter referred to as the "shipowners") are defendants and third-party plaintiffs in an action by former seamen alleging asbestos injuries. The shipowners appeal from summary judgments in favor of Owens-Corning Fiberglass Corporation ("OCF") on their third-party claims seeking indemnity or contribution from OCF, whose asbestos products, it is alleged, were aboard the shipowners' vessels and inured the seamen. We affirm.

This case represents another installment in the ongoing maritime asbestos litigation addressed previously by this Court in *Foster Wheeler USA Corp. v. Owens-Illinois*, Inc., 595 So. 2d 439 (Ala. 1992), and *Sheffield v. Owens-Corning Fiberglass Corp.*, 595 So. 2d 443 (Ala. 1992). Personal representatives of the estates of

Thomas Shepherd and James L. Burnett Sr. ("plaintiffs") sued OCF in the District Court of Dallas County, Texas, in 1987 and 1988, respectively, alleging that asbestos products manufactured by OCF had caused the deaths of their decedents, former seamen. These personal representatives, on February 8, 1990, and February 24, 1989, respectively, also filed actions against the shipowners in the Mobile County, Alabama, Circuit Court. In the Alabama actions, the plaintiffs alleged, inter alia, that the ships on which the seamen worked had been unseaworthy because of asbestos fibers aboard them. The shipowners, seeking indemnity or contribution, impleaded OCF and numerous other manufacturers of asbestos-containing products, which, they alleged, were responsible for the deaths of the plaintiffs's decedents.

Subsequently, OCF obtained agreements with the plaintiffs settling their claims against OCF and purporting to release OCF from any further liability arising out of the plaintiffs' claims. OCF then moved for summary judgments in the Mobile County Circuit Court, contending that the settlements with the plaintiffs barred the shipowners' claims against OCF for indemnity or contribution. In February 1991, the trial court entered summary judgments in favor of OCF in both cases. These judgments were subsequently certified as final judgments, pursuant to Ala. R. Civ. P. 54(b). The shipowners appealed. On July 15, 1992, this Court granted the shipowners' motions to consolidate the appeals of the summary judgments for briefing and oral argument. On August 12, 1992, the trial court granted motions filed by the shipowners to dismiss the plaintiffs' claims against them on the basis of the actions pending in Texas. In *Shepherd v. Maritime Overseas Corp.*, [Ms. 1911884, March 12, 1993] So. 2d (Ala. 1993), we reversed the judgments dismissing the plaintiffs' claims against the shipowners and remanded their causes for further proceedings.

***2.** On these appeals of the summary judgments in favor of OCF, the shipowners contend that they are entitled to recover from OCF their attorney fees or damages in the event of a damages award, under (1) an indemnity theory or (2) a rule allowing contribution from a joint tort-feasor notwithstanding that tort-feasor's

settlement with, and release by, the plaintiff.

I. Indemnity

The shipowners contend that OCF's conduct in supplying asbestos-containing products for shipboard use was "actively" wrongful, while their fault consisted, they contend, only in failing to discover the danger of asbestos - conduct that they insist was only "passively" wrongful. See *Wedlock v. Gulf Mississippi Marine Corp.*, 554 F.2d 240, 243 (5th Cir. 1977) ("the classic case of passive negligence occurs ... when one joint tortfeasor creates a danger that the other (passive) tortfeasor merely fails to discover or to remedy"); *Avondale Shipyards, Inc., v. Vessel Thomas E. Cuffe*, 434 F. Supp. 920, 928 (E.D. La. 1977) ("breach [of] an absolute duty to provide a seaworthy vessel" constitutes passive fault). They contend that maritime law accords them a right to recoup their attorney fees from OCF pursuant to a theory of "active" versus "passive" fault.

Preliminarily, we note that the procedural posture of the shipowners in this case renders their claims for indemnity particularly unpersuasive. Specifically, the shipowners are nonsettling, third-party plaintiffs seeking indemnity from third-party defendant OCF, following OCF's settlement with the plaintiffs.

"The basis for indemnity is restitution, and the concept that one person is unjustly enriched at the expense of another when the other discharges liability that it should be his responsibility to pay." Restatement (Second) of Torts s 886B (1977), comment c. "The unexpressed premise has been that indemnity should be granted in any factual situation in which, as between the parties themselves, it is just and fair that the indemnitor should bear the total responsibility, rather than to leave it on the indemnitee..." *Id.*

At this stage, the shipowners have satisfied no obligation. Nor has OCF, which was impleaded by the shipowners, been unjustly enriched by the shipowners' litigation. This case thus involves none of the traditional elements necessary to trigger a right to

indemnity. On a more general ground, however, recent developments in maritime law render misplaced an admiralty defendant's reliance on the active-passive fault doctrine.

In 1975, the United States Supreme Court abrogated the "divided damages" rule set forth in *The Schooner Catherine v. Dickinson*, 58 U.S. (17 How.) 170 (1855), which required joint maritime tort-feasors to share damages equally, regardless of their relative degrees of fault. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). In so doing, it established in maritime law the concept of comparative fault, that is, a "rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party." *Id.* at 398

***3.** After *Reliable Transfer*, a number of admiralty courts concluded that maritime law no longer recognized a right to indemnity based on the active-passive fault distinction. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826 (5th Cir. 1992); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (llth Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154 (5th Cir. 1985); *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982). In this connection, *Loose* offered the following pertinent comments: "The introduction of the rule of comparative fault to maritime torts requires reconsideration of the active-passive negligence doctrine. The common law courts were at first unwilling 'to make relative value judgments of degrees of culpability among wrongdoers.' The principle that an actively negligent tortfeasor should be required to indemnify a tortfeasor only passively negligent was developed to alleviate the harsh rule that prohibited apportionment among tortfeasors. In a sense, then, the indemnity rule was a precursor of modern systems of comparative fault because it attempted to transfer ultimate legal liability to the defendant truly in the wrong. Comparative fault seeks the same objective both more persuasively and more accurately. A comparative fault system not only eliminates the doctrine of contributory negligence but also apportions fault among joint tortfeasors in accordance with a precise determination, not merely equally or all-or-none. "It is difficult to see the need for the active-passive

indemnification rule in a comparative fault system. While the active-passive concept is more equitable than strict nonapportionment, there have never been satisfactory distinctions between the definition of 'active' and 'passive.' The district court in this case did not attempt to define these terms, but left it to the jury to define them from their everyday significance. As the district judge pointed out, however, it would have been difficult on the authority of decided cases to phrase a charge that would have been instructive and clear. There is, therefore, all the more reason to determine the degree of responsibility of each tortfeasor on the facts as presented at trial, and then to apportion damages among the tortfeasors on that basis. *Leger* [*v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979),] has already extended the *Reliable Transfer* concept of proportionate fault to maritime personal injury cases. We reaffirm that extension and emphasize what other courts and commentators have said before us: the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party." 670 F.2d at 500-02 (footnotes omitted). See also D. Owen and J. Moore III, *Comparative Negligence In Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 955 (1983) ("rationale of *Reliable Transfer* 'is strongly at odds' with that of tort indemnity"). We find this reasoning persuasive and hold that there is no right to indemnity based on a distinction between active and passive fault in maritime actions filed in Alabama state courts.

II. Contribution

***4.** OCF's contention that its settlements with the plaintiffs extinguish the shipowners' claims for contribution presents this Court once again with the question of the effect of a settlement on a tort-feasor's liability to joint tort-feasors for contribution. The issue was presented earlier in *Foster Wheeler USA Corp. v. Owens-Illinois, Inc.*, 595 So. 2d 439, 442-43 (Ala. 1992), another appeal spawned by the maritime asbestos litigation in progress in Mobile County. Although we ultimately deferred a decision on that question because of the brevity of the parties' treatment of the issue in

relation to its potential impact on the large volume of pending cases, we stated: "The resolution of this issue is not without difficulty, as evidenced by the three approaches expressed in the Restatement (Second) of Torts s 886A, comment m: " 'm. Release. There are three possible solutions for the situation in which one tortfeasor pays a sum to the injured party and takes a release or covenant not to sue that does not purport to be a full satisfaction of the claim. Each has its drawbacks and no one is satisfactory. "'[Option I]. The money paid extinguishes any claim that the injured party has against the party released and the amount of his remaining claim against the other tortfeasor is reached by crediting the amount received; but the transaction does not affect a claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation. This has been called the fairest solution, but it has proved to be very discouraging to settlements. A tortfeasor (and his insurance company) has no incentive to make an individual settlement if he is not at all sure that it will extinguish his liability and allow him to close his books on the subject. This works most decidedly to the detriment of the settling tortfeasor, and the insurance companies have been strongly opposed to it. "'[Option II]. The money paid extinguished both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution. This solution favors the settling tortfeasor and his insurance company and is supported by them. But it can be very unfair to the other tortfeasors and provides a clear incentive to collusion between the settling parties. To avert this it may be necessary to impose a requirement of "good faith." But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated. "'[Option III). The money paid extinguishes any claim that the injured party has against the released tortfeasor and also diminishes the claim that the injured party has against the other tortfeasors by the amount of the [pro rata] equitable share of the obligation of the released tortfeasor. This solution works strongly against the interest of the inured party and may have the effect of discouraging him from entering into a

settlement. It may, for example, make it not desirable for him to accept the full amount of coverage in a minimum insurance policy if the equitable share of the obligation of the tortfeasor is likely to be substantially larger.

***5.** "'Important policy reasons therefore weigh against each of the three solutions. Case authorities and statutes are also divided and there is no semblance of a consensus. The experience in drafting the uniform laws depicts the difficulties of the problem. The 1939 uniform act adopted the first solution; the 1955 act supplanting it adopted the second solution; and the 1977 act supplanting it adopted the third solution. "'The Institute leaves these issues to a caveat and takes no position.' (Emphasis added [in *Foster Wheeler USA*].)" 595 So.2d at 442-43

(quoting Restatement (Second) of Torts s 886A (1977), comment m). The shipowners urge us to adopt Option I, under which, they contend, their claims against OCF for contribution would remain viable.

At the outset of our discussion of this issue, we note that "attorney's fees and legal costs incurred by the defending tortfeasor [are] not recoverable in contribution from the other negligent parties." *ODD Bergs Tankrederi A/S v. S/T Gulfspray*, 650 F.2d 652, 655 (5th Cir. 1981). However, resolution of the question regarding the effect of the pro tanto settlements is necessitated by our reversal of the judgments dismissing the plaintiffs' claims against the shipowners in *Shepherd v. Maritime Overseas Corp.*, [Ms. 1911884, March 12, 1993] So. 2d (Ala. 1993). Moreover, because the issue is of grave consequence to the litigation pending in Mobile County, we deem it expedient at this time to set forth rules governing its disposition.

Federal courts sitting in admiralty have reached no consensus on this issue. The Fifth Circuit Court of Appeals currently allocates damages among the tort-feasors on a pro rata basis consistent with Option III, as applied in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979); see *Teal v. Eagle Fleet, Inc.*, 933 F.2d

341 (5th Cir. 1991); *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 n.11 (5th Cir. 1988) (in dicta, approving *Leger's* allocation method), *cert. denied*, 490 U.S. 1106 (1989); *Vickers v. Chiles Drilling Co.*, 822 F.2d 535 (5th Cir. 1987); *Martin v. Walk, Haydel & Assoc., Inc.*, 742 F.2d 246 (5th Cir. 1984); or, alternatively, reduces the plaintiffs total claim by the amount of the pro tanto settlement, consistent with Option II, see *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert denied*, U.S., 112 S. Ct. 1242 (1992); *Myers v. Griffin-Alexander Drilling Co.*, 910 F.2d 1252 (5th Cir. 1990) (disapproving *Leger's* damages allocation procedure); *Hernandez v. M/V Rajaan*, 841 F.2d 582 (5th Cir.), *cert denied*, 488 U.S. 981 (1988); but does not permit contribution from a settling tort-feasor as provided by Option I. *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 834 (5th Cir. 1992). The Seventh Circuit Court of Appeals rejected Option III but declined to choose between Options I and II. In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279 (7th Cir. 1992). The Eighth Circuit Court of Appeals has adopted Option III and criticized Option I. *Associated Electric Cooperative, Inc. V. Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991). See also *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991) (expressly rejecting Option I and applying a combination of Options II and III).

***6.** Although these courts have expressed considerable divergence of opinion, they were virtually unanimous in declining to apply Option I until the Eleventh Circuit refused to recognize a settlement bar to contribution in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (llth Cir.), *cert. denied*, U.S., 113 S. Ct. 484 (1992). *Miller v. Christopher*, 887 F.2d 902, 906 (9th Cir. 1989) (criticizing Option I and noting that no federal admiralty court had applied it). The shipowners have been able to cite no other admiralty case applying that approach. However, they urge us to follow *Great Lakes Dredge* on the ground, inter alia, that because Alabama lies within the geographical area encompassed by the Eleventh Circuit, failure to follow *Great Lakes Dredge* will lead to forum shopping. We share this concern; however, our concern over the potentiality of forum shopping is insufficient to override our reluctance to follow an approach that, in this Court's view, is

inconsistent with the principles of maritime law and has no support among the rest of the federal circuits that have addressed this issue. [FN1] Indeed, our reading of Great Lakes Dredge compels us to conclude that the Eleventh Circuit's rejection of Option III and its consequent adoption of Option I resulted from its misconstruction of Leger v. Drilling Well Control, Inc., 592 F.2d 1246 (5th Cir. 1979), a leading authority for the application of Option III.

In *Leger*, the plaintiff sued his employer, Drilling Well Control, Inc. ("DWC"), Dresser Offshore Services, Inc. ("Dresser"), and Continental Oil Company ("Continental") because of injuries he sustained while working on a barge owned by Dresser at the site of an offshore oil well owned by Continental. *Id.* Before trial, DWC and Continental settled with Leger for $82,331.05 and $100,000, respectively. Damages were awarded Leger in the amount of $284,090 and fault was allocated according to the following percentages: (1) Leger, 35%, (2) Dresser, 45%, (3) Continental, 20%, and (4) DWC, 0%. The district court entered a judgment against Dresser in the amount of $127,840, which "reflect[ed] the total damages of $284,090.00 reduced by $99,430.17 representing the 35% contributory negligence of the plaintiff and by $56,817.24 representing the 20% negligence attributed to Continental. No reduction in the judgment was made for DWC's settlement since DWC was found not to be negligent." *Id.* at 1248. This procedure imposed upon Dresser, the nonsettling tortfeasor, liability for damages based solely on its pro rata share of the fault.

On appeal, Dresser contended that the trial court erred in refusing to calculate the judgment based on a pro tanto reduction of the total judgment by $182,331.05, the amount of the plaintiff's settlement with DWC and Continental. It contended, moreover, that the damages recoverable under the court's pro rata method represented a windfall to Leger. The Court of Appeals for the Fifth Circuit rejected these contentions and affirmed the judgment. It explained: ***7.** "In accord with its ground rules, the trial court rendered judgment against Dresser for $127,840.00, representing Dresser's percentage of negligence (45%) multiplied by Leger's damages as found by the jury ($284,090.00). Although Leger nominally

received $310,171.05 by virtue of the settlement and the judgment, we do not consider this a double recovery. Leger merely obtained a favorable settlement. By releasing DWC and Continental in exchange for $182,331.05, Leger 'sold' or relinquished any claims which he had against them. See *Rose v. Associated Anesthesiologists*, 163 U.S. App. D.C. 246, 501 F.2d 806 (1974) (characterizing a settlement as a pro rata sale of the plaintiffs claim). At the time of the settlement negotiations, no one knew how a jury would apportion fault or in what amount it would find damages. By settling with Continental and DWC, Leger took the risk that he was foregoing a larger amount possibly to be obtained at trial. Likewise, Continental and DWC must have considered the amount for which they settled to be less than their exposure at trial would have been. Dresser made a different assessment. By going to trial it took the risk that the jury would find substantial damages and a high degree of negligence on its part. With the benefit of hindsight it is clear that only Leger correctly charted his course. However, according to the rules which we adopt today, Leger could have lost a great deal. For example, if he had settled with DWC and Continental for $182,331.05 and if the jury had found $1,000,000 in total damages, but that Dresser was only 5% negligent, Leger would have been left with the $182,331.05 in settlement with DWC and Continental and $50,000 in judgment against Dresser (5% of $1,000,000). He would have released a claim subsequently found to be worth $950,000 in exchange for $182,331.05. He could not then complain that he made a poor settlement and that he should receive more based on the jury's assessment of his total damages at $1,000,000. Whether the plaintiff obtains a favorable or unfavorable settlement, he may only recover once for each wrongdoer's percentage of fault." *Leger*, 592 F.2d at 1250 (footnotes omitted).

As pointed out above, only one of the two nonsettling tort-feasors, Dresser, had been found negligent. Because of the procedural posture of the parties as the result of this finding, *Leger* focused primarily on only one issue necessarily implicated by Option III, that is, the method of allocating damages among the nonsettling tort-feasors. Thus, the court was not squarely confronted with two

other issues inherent in the application of that procedure- the question of joint liability among the nonsettling tort-feasors and the issue presented in this case, that is, the efficacy of a settlement as a bar to a nonsettling tort-feasor's right of contribution. As a corollary, however, the reduction of the plaintiff's claim by the amount of the settling tort-feasor's pro rata share of fault obviated the necessity of contribution from a settling tort-feasor—none of the nonsettling tort-feasors could be charged any amount representing the settling tort-feasor's share of fault. T. Schoenbaum, Admiralty and Maritime Law s 4-15, at 26 (Supp. 1992). The following remarks from Leger are also relevant in this connection: ***8.** "The encouragement of settlements is the final factor which must be considered in this case. Whether the plaintiff or any of the defendants are ultimately found to have made a favorable settlement, we will 'respect the aleatory nature of the settlement process...' *Doyle v. United States*, 441 F. Supp. 701, 711 n. (D.S.C. 1977). If Dresser were allowed to reduce Leger's recovery against it by the dollar value of Leger's settlement, Dresser would be left to pay a small portion ($284,090.00 total damages minus $182,331.05 settlement minus $99,400 for plaintiffs contributory negligence equals $2,358.95) of the total damages even though its negligence was the main contributing factor in causing them. Thus, Dresser would benefit substantially from its intransigence or miscalculation in refusing to settle the case. We refuse to adopt an approach which would reward a defendant for refusing to settle. If a party decides to try a case, it must be prepared to accept whatever benefits or burdens flow from its decision." *Id.* at 1250-51.

The presence in *Leger* of only one negligent nonsettling tort-feasor also occasioned Leger's most conspicuous unanswered question, that is, whether liability among remaining nonsettling tort-feasors remained joint. That Leger could be read as adopting a modified form of joint liability apparently caused some courts to reject that approach – most significantly, the Eleventh Circuit, which in a trilogy of decisions rejected the Leger approach and applied Option I. [FN2]

The litigation precipitating the Eleventh Circuit's application

of Option I involved three successive appeals, beginning with *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716, 718 (llth Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); including *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1544 (Ilth Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); and culminating in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (llth Cir.), *cert. denied*, U.S., 113 S.Ct. 484 (1992). The litigation arose out of a collision on the St. Johns River between a dredge owned by Great Lakes Dredge & Dock Company ("Great Lakes") and a tanker owned by Chevron Transport Corporation ("Chevron"). The plaintiffs, having settled their claims against Chevron, sued Great Lakes, their Jones Act employer. The third-party claims of Great Lakes against Chevron for contribution were severed; thus, Chevron was not a defendant in the initial trial.

At trial, the jury, pursuant to special interrogatories on which it was to determine the relative percentages of fault of all entities involved in the accident, attributed 100% of the fault to Chevron, a nonparty. Consequently, it assessed no damages.

The issue in *Ebanks*, the first appeal, concerned only the proper method of apportioning fault. [FN3] Great Lakes contended that the method of allocation was consistent with, and required by, *Leger*. The court distinguished *Leger* on the ground that Chevron, unlike the settling defendants in *Leger*, had never been subject to the plaintiffs' claims. *Ebanks*, 688 F.2d at 720. More significantly, however, the court concluded that *Leger's* "effect as precedent [had] been weakened" by *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *Ebanks*, 688 F.2d at 720, which involved the proper construction of an amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S. C. s 905.

***9.** The amendment at issue in *Edmonds* prevented a negligent shipowner from recouping from a longshoreman's employer, whose negligence concurred with that of the shipowner to inure the longshoreman, any damages for which the shipowner might be liable. The United States Supreme Court held that the amendment

did not abrogate the rule of joint liability long recognized in maritime torts in favor of a proportionate fault rule. [FN4] 443 U.S. at 263-64. *Edmonds* thus reaffirmed the rule allowing a maritime plaintiff "to sue in a common-law action all the wrong-doers, or any one of them, at his election," and, absent contributory negligence, to obtain a "judgment in either case for the full amount of his loss." *Id.* at 260 n.7 (quoting *The Atlas*, 93 U.S. 302, 315 (1876)).

Ebanks concluded that because maritime law, as reaffirmed by *Edmonds*, provided for recovery "against either of several tortfeasors, without regard to the percentage of fault, it was error for the trial court to distract the [jury's] attention by requiring it to allocate the degree of fault between the defendant and a non-party." 688 F.2d at 722. Implicit throughout the court's analysis of the allocation issue was its view that the *Leger* approach involved a modified form of joint liability and was, consequently, inconsistent with traditional principles of maritime law. This view of *Leger* was even more prominent in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1544 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988), on appeal following return to remand.

After remand by Ebanks, Great Lakes settled with all the plaintiffs except Vivian Self, the widow of a former seaman employed by Great Lakes. In the second trial of that case, the trial judge (1) apportioned the fault of Chevron and Great Lakes vis-a-vis each other but reserved to a subsequent trial an adjudication of their damages, (2) determined the liability of Great Lakes to Self, (3) and awarded damages to Self. *Self* explained the findings of the trial court as follows: "The court found that Self's total damages amounted to $661,354.00 and that Chevron bore 70% of the fault for the accident while Great Lakes bore 30%. Because Self had already settled with Chevron [for $315,000], and because the trial court was of the view that this court's opinion in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), required an apportionment of damages, the court awarded Self a judgment of $198,406.20 against Great Lakes, which represents 30% of Self's total damages." *Self*, 832 F.2d at 1544-45.

A panel of the Eleventh Circuit reversed that portion of the judgment awarding damages on the basis of Great Lakes' pro rata share of fault. It held that the plaintiff's damages from the nonsettling tort-feasor should be calculated on a pro tanto basis, that is, a reduction by the amount of her settlement with Chevron, the settling tort-feasor. *Id.* at 1548.

***10.** Focusing once again on the perceived tension between *Leger* and *Edmonds*, the court construed *Leger* as standing for the proposition that "it is the plaintiff who bears the loss or obtains the gain." *Self*, at 1546 (emphasis added). Concluding that such a rule was inconsistent with *Edmonds*, which, according to *Self*, required the maritime defendant to bear "any inequity which results from the implementation of a seaman's damage award," *id.*, the court went further than it had in *Ebanks*, declaring, in effect, that *Leger* could not "withstand the more recent *Edmonds* opinion." *Self*, at 1546 (citing *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988), and *Drake Towing Co. v. Meisner Marine Const. Co.*, 765 F.2d 1060 (11th Cir. 1985)).

After *Self*, Great Lakes settled with Self's estate for $2,050,000 and, contending that it had paid more than its equitable share of the damages, subsequently sought contribution from Chevron. *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, U.S., 113 S. Ct. 484 (1992). Thus, for the first time in that litigation, the Eleventh Circuit was directly confronted with the issue presented in this case, that is, the preclusive effect to be accorded a settlement and release.

In *Great Lakes Dredge*, the third and latest appeal in that litigation, the court framed the issue as "[w]hether, given the pro tanto method adopted in *Self*, a joint tortfeasor who is forced to bear more than its fair share of an injured party's damages is prohibited by a settlement bar rule from seeking contribution from a settling joint tortfeasor." *Id.* at 1580. That the *Great Lakes Dredge* court was not writing on a clean slate is obvious from the terms in which the court framed the issue. Indeed, the court expressly concluded

that *Self* had "overruled *Leger* and rejected the proportionate distribution of liability." 957 F.2d at 1581.

Considering itself bound by stare decisis, *id.* at 1580 n.4, to reject one of the two options that bars contribution from a settling tortfeasor, the court next compared the relative advantages and disadvantages of Options I and II. Observing that a nonsettling tortfeasor could, under the pro tanto approach adopted in *Self*, "be forced to pay for more than [its] proportionate share of damages," the court concluded that on balance, an equitable distribution of damages among nonsettling tort-feasors through the right of contribution outweighed the policies favoring settlements. 957 F.2d at 1581.

We might be inclined to agree with the approach thus adopted by the Eleventh Circuit if its analysis of *Leger* and, therefore, Option III were sound. We conclude, however, that the opposite is true. The court's analysis proceeded upon the premise that Option III as applied in *Leger* abrogated or modified joint liability among nonsettling tort-feasors. Such an approach would relieve nonsettling tort-feasors not only of the liability represented by the pro rata share of settling tort-feasors, but also of liability represented by the pro rata shares of the nonsettling tort-feasors, thus requiring the plaintiff to bear the risk, for example, of a nonsettling tort-feasor's insolvency. Such an approach would, indeed, contravene the policy of maritime law, which has traditionally provided "special protection" for injured seamen. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1548 (llth Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908, 917 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988); see also *Cosmopolitan Shipping Co. V. McAllister*, 337 U.S. 783 (1949).

***11.** Nothing in the text of the Restatement, however, or, for that matter, *Leger*, requires this result. [FN5] Significantly, the Fifth Circuit has recently declared expressly that *Leger* did not "eliminate the well established maritime rule of joint liability." *Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421, 1430 n.11 (5th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Option III, therefore, does not prevent a maritime plaintiff from recovering all his dam-

ages — minus an amount represented by the settling tort-feasor's percentage of fault — from any of the nonsettling tort-feasors. As among those tort-feasors, contribution provides the vehicle through which an equitable distribution of damages may be achieved. See *Miller v. Christopher*, 887 F.2d 902, 904 (9th Cir. 1988). The tort-feasors, rather than the plaintiff, thus bear the risk of a joint tort-feasor's insolvency.

Because this Court's understanding of Option III and *Leger* differs fundamentally from the construction offered by the Eleventh Circuit, we see no tension between Option III and maritime law such as was expressed in the *Ebanks-Self-Great Lakes* trilogy. On the contrary, this approach appears to represent the most efficient method of accommodating the policies of federal and maritime law. As discussed above, the reduction in a plaintiff's claim by the pro rata method of Option III is as likely to inure to the plaintiff's benefit as a pro tanto reduction, which obtains pursuant to Options I and II, and it does not seem unreasonable to require the plaintiff to forgo that portion of his claim represented by the pro rata fault of the tort-feasor with which he voluntarily settled. A pro rata reduction in the plaintiff's total claim also prevents unfairness to the nonsettling tort-feasors that can occur under Option II's pro tanto reduction, which "allows the plaintiff, in effect, to 'repudiate' his bargain since he can be made whole out of the pockets of the nonsettling tortfeasors." T. Schoenbaum, Admiralty and Maritime Law s 4-15, at 26 (Supp. 1992). Indeed, allocation of damages based on the settling tort-feasor's pro rata share of fault obviates the need for contribution to nonsettling tort-feasors. *Id.*

The application of Option III, which, unlike Option I, recognizes the finality of a settlement, also accommodates the policy of the federal courts favoring settlements. See Fed. R. Civ. P. 68; *Marek v. Chesny*, 473 U.S. 1, 12-13 (1985) (Powell, J., concurring); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910) ("Compromises of disputed claims are favored by the courts."); see also *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991).

Moreover, allowing contribution from settling tort-feasors could subject plaintiffs to liability for damages and expenses recovered by nonsettling defendants from settling defendants. For example, the settlement agreements involved in this case contained the following provision: ***12.** "In consideration for the payment of the aforesaid sum, the Plaintiffs ... agree to and do hereby indemnify and hold harmless OCF from any and all liability for the payment of damages by reason of any claim asserted by any person, firm, corporation or entity against OCF for indemnity or contribution as a result of any claim, demand, settlement, judgment or payment made to the Plaintiffs or their representatives, heirs or assigns, arising out of any injuries, disease, damages or death to decedent or loss of consortium or other damages to Plaintiffs." (Emphasis added.) Based on this indemnity provision, OCF has stated its intention to pursue its rights and remedies against the plaintiffs in the event the shipowners' claims against it are successful.

These considerations compel us to conclude that Option III affords the appropriate method for the disposition of maritime cases filed in Alabama state courts. The shipowners are, therefore, precluded by OCF's settlements from seeking contribution from OCF for attorney fees or damages.

The shipowners further contend that even under Option III a settling defendant must remain in the suit to litigate the issue of its own percentage of fault. They suggest that the alternative, that is, requiring the plaintiff to minimize at trial the settling tort-feasor's percentage of fault is unworkable and unfair to the plaintiff. Thus, they contend that the trial court erred in granting OCF's motions for summary judgment.

We agree that Option III requires the trial court to determine the percentage of the settler's fault. *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991); *Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812-13 (W.D. La. 1986); see also M. Yeates, P. Dye, Jr., and R. Garcia, Contribution and Indemnity in Maritime Litigation, 30 S. Tex. L. Rev. 215, 246-47 (1989). However, we do not agree that requiring the plaintiff to

exculpate the settling tort-feasor at trial is unworkable or necessarily inures to the plaintiff's detriment. On the contrary, requiring an alleged tort-feasor to remain in the suit after reaching a settlement with the plaintiff would virtually nullify the utility of the rule recognizing a settlement bar to contribution — one of the principal advantages of Option III. Just as "a tortfeasor has no incentive to enter an individual settlement if it will remain vulnerable to suit based on plaintiffs claim," *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222 (S.D.N.Y. 1991), it would seem to have little more incentive to settle if it were required to remain in the suit, thus incurring further litigation expense. *Bordelon v. Consolidated Georex Geophysics*, 628 F. Supp. 810, 812-13 (W.D. La. 1986). Moreover, an alleged tort-feasor constrained to litigate the issue of its own fault after a settlement and release would have little incentive to mount a compelling defense of a position for which it could not incur further liability regardless of the outcome of the suit. *Bordelon*, 628 F. Supp. at 812-13 (W.D. La. 1986). Indeed, it is not unreasonable to suppose that a tribunal seeking to determine the percentage of fault attributable to a settling tort-feasor would find more persuasive the plaintiff's vigorous efforts at exculpating the alleged tort-feasor, bolstered, no doubt, by evidence gleaned through the tort-feasor's cooperation incident to dismissal from the suit, than the grudging defense of an unwilling litigant.

***13.** In sum, the shipowners have failed to demonstrate in what respects this procedure is unworkable, and we disagree with their contentions that it is unfair. We conclude, therefore, that the summary judgments in favor of OCF were proper; those judgments are affirmed.

1911251 AFFIRMED.

1911252 AFFIRMED.

Hornsby, C. J., and Maddox, Almon, Shores, Houston, and Steagall, JJ., concur.

FN1. This Court is not bound by decisions of lower federal courts. *Ballew v. State*, 292 Ala. 460, 296 So. 2d 206 (1974), *cert. denied*, 419 U.S. 1130 (1975); *Seibold v. State*, 287 Ala. 549, 253 So. 2d 302 (1970). This rule is particularly applicable where, as here, the circuits are in conflict. See Note, The State Courts and the Federal Common Law, 27 Alb. L. Rev. 82 (1963).

FN2. A panel decision in the Court of Appeals for the First Circuit also appears to have concluded that *Leger* modified traditional principles of joint and several liability. *Joia v. Jo-Ja Service Corp.*, 817 F.2d 908 (1st Cir. 1987), *cert. denied*, 484 U.S. 1008 (1988).

FN3. Preliminarily, the court acknowledged that it was bound by *Leger* pursuant to *Bonner v. City of Prichard*, 661 F.2d 1206 (llth Cir. 1981), in which an en banc Court of Appeals for the Eleventh Circuit formally adopted the case law of the Fifth Circuit, from which the Eleventh Circuit was formed by the Fifth Circuit Court of Appeals Reorganization Act of 1980, P.L. 96-452, 94 Stat. 1995.

FN4. The Court of Appeals for the Fourth Circuit had construed the statute as limiting the liability of the shipowner to its pro rata percentage of fault.

FN5. As we noted above, the issue of joint liability among nonsettling tort-feasors did not arise in *Leger* because that case involved only one nonsettling tortfeasor.

END OF DOCUMENT

No. 93-180

In The

Supreme Court of the United States

October Term 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STUART C. MARKMAN
KYNES & MARKMAN, P.A.
100 S. Ashley Drive,
Suite 1300
Post Office Box 3396
Tampa, FL 33601-3396
(813) 229-1118
Attorneys for Florida Power and Light Company, Inc., Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Eleventh Circuit's decision presents a true jurisdictional conflict involving a maritime joint tortfeasor's right to seek contribution from another joint tortfeasor who has settled with the injured party.

LIST OF PARTIES

Respondent Florida Power & Light Company's parent company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Boca Grande Club, Inc. ("Boca Grande") correctly states there are three general approaches to contribution by non-settling maritime joint tortfeasors. Pet. at 5. Boca Grande neglects to identify, however, the precise approach it urged and the district court adopted in the order granting summary judgment in Boca Grande's favor and against Florida Power & Light Company's ("FP&L's") contribution claim. This Statement of the Case corrects this omission and reveals Boca Grande has never before taken the position it now advances in its petition for certiorari. It also discloses that the approach Boca Grande actually took below is at odds with the holdings in the very decisions it now aligns itself with in its effort to depict a conflict worthy of review on certiorari.

A. Boca Grande's Motion for Summary Judgment

Although its petition embraces a range of decisions applying versions of two of the three possible approaches to contribution by a non-settling maritime joint tortfeasor, Pet. at 5-10, Boca Grande took a very different and narrower stance below. In its motion for summary judgment, Boca Grande urged only a variation of the second approach, the so-called "settlement bar rule." RA 4-5.[1] In this regard, Boca Grande argued that because it had settled with the decedents, any possibility that it might have to pay a claim for contribution to FP&L or any other

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[1] References to Respondent's Appendix ("RA") and to Petitioner's Appendix ("A") will be as above, by letters and numbers.

joint tortfeasor who had paid more than its equitable share was automatically extinguished. RA 4-5.

In addition, Boca Grande specifically opposed the imposition of a condition that its settlement be in good faith to prevent unfairness to other tortfeasors and collusion among the settling parties. RA 5-13. In opposing this condition, Boca Grande rejected as "wasteful and unworkable" the Ninth Circuit's imposition of this condition in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989). RA 10-11. Boca Grande's petition now purports to adopt *Miller*'s reasoning. Pet. at 5, 7.

B. The District Court's Order

The district court entered an order granting summary judgment which adopted the precise version of the second approach Boca Grande urged. A 5-7. It held Boca Grande's settlement with the decedents constituted an absolute bar to FP&L's action for contribution, and it specifically rejected any requirement that the settlement be non-collusive or in good faith. A 6-7.

C. The Eleventh Circuit's Decision

The settlement bar rule on which Boca Grande and the trial court relied was rejected by the Eleventh Circuit in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992). *Great Lakes* was decided during the pendency of the appeal in the instant case. It adopted the first approach under which an action

for contribution against a settling joint tortfeasor is permitted. *Id.* at 1582-83. Based on the intervening decision in *Great Lakes*, the Eleventh Circuit vacated the instant summary judgment and remanded the case for resolution of FP&L's contribution claim against Boca Grande. *In Re: Complaint of Boca Grande Club, Inc.*, 990 F.2d 606, 607 (11th Cir. 1993).

REASONS FOR DENYING THE WRIT

In its "Reasons for Granting the Writ," Boca Grande contends other federal circuits and one state court have adopted rules concerning contribution against a settling maritime joint tortfeasor that conflict with the instant Eleventh Circuit decision in *In Re: Complaint of Boca Grande Club, Inc.*, 990 F.2d 606 (11th Cir. 1993). Pet. at 5-10. Contrary to Boca Grande's assertion, however, review of the governing principles and the decisions on which Boca Grande relies reveals there is no true decisional conflict or other reason for granting certiorari. In any event, the Supreme Court need not reach the question Boca Grande poses because Boca Grande has never previously urged the position it now claims to support and adopt.

The Eleventh Circuit's Decision Does Not Present A True Jurisdictional Conflict Involving A Maritime Joint Tortfeasor's Right To Seek Contribution From Another Joint Tortfeasor Who Has Settled With The Injured Party.

A. Certiorari was recently denied under identical circumstances in *Great Lakes*

Putting to one side that it does not articulate the "special and important reasons" required under Rule 10

for this Court to grant certiorari, Boca Grande's request for review faces a threshold obstacle. Boca Grande's petition rests on its contention that the rule the Eleventh Circuit applied to reverse the summary judgment in the instant case conflicts with decisions of other circuits and one state court. Pet. at 5-10. The rule Boca Grande challenges was announced in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992) ("*Great Lakes*"). *Great Lakes* is the focal point of Boca Grande's petition.

Boca Grande's attack on the rule in *Great Lakes* is seriously undermined because the Supreme Court recently denied certiorari in that case. *Id.* As shown below, there has been no new decision or other change in circumstances since the denial of certiorari in *Great Lakes* to generate a jurisdictional conflict or other reason for review where one did not exist previously. Because the Supreme Court recently denied certiorari under identical circumstances, the instant petition should be denied as well.

B. There is no true conflict among the circuits or with the Alabama Supreme Court

There exists no true conflict between the instant Eleventh Circuit decision and the other circuits or the Alabama Supreme Court concerning contribution against a settling maritime tortfeasor. While there are three generally recognized approaches to the issue, the approaches the courts have actually adopted are not in conflict. The

first approach, which was adopted by the Eleventh Circuit in *Great Lakes* and applied here, does not conflict with the third approach. The second approach, which Boca Grande urged below, has not been adopted exclusively by the other federal appellate courts or the Alabama Supreme Court. For these reasons, this case does not present a true conflict concerning contribution against a settling maritime tortfeasor.

1. The first and third approaches are not in conflict.

As noted in Boca Grande's petition, the authorities recognize three generally accepted methods for dealing with contributions against settling tortfeasors. They are:

> (1) Allowing an action for contribution against the settling tortfeasor by any other tortfeasor who has paid more than his or her equitable share of the plaintiff's claim;
>
> (2) Imposing a bar to contribution claims against the settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith;" and
>
> (3) Reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.[2]

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[2] The first approach, which the Eleventh Circuit adopted in the instant case, has been called the fairest solution by the *Restatement*. *Miller*, 887 F.2d at 905. The second, the settlement bar rule Boca Grande advocated below, is described by the

Great Lakes, 957 F.2d at 1581, citing *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989), and *Restatement (Second) of Torts*, § 886A comment m (1979).

Both the first and third approaches are consistent with the Supreme Court's key decisions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed.2d 694 (1974), *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975), and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979).[3] *Cooper* reaffirmed the general tenent of maritime law that one joint tortfeasor is entitled to contribution from another joint tortfeasor. In articulating this conclusion, the Supreme Court identified the core principles underlying maritime contribution as (1) a more equal distribution of justice and (2) safety or deterrence. 417 U.S. at 110-111.

In discarding the old rule of equally divided damages in favor of apportionment of damages according to degrees of causative fault, *Reliable Transfer* focused on the

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Restatement as potentially unfair to non-settling tortfeasors in the absence of a good faith requirement to prevent collusion. *Id.*

Presumably because it argued in favor of the second option *without* the condition that the settlement be in good faith and non-collusive, RA 5-13, Boca Grande omits any reference to a good faith requirement in its articulation of the three methods. Pet. at 5.

[3] Boca Grande does not and cannot claim the Eleventh Circuit's decision in the instant case conflicts with *Cooper*, *Reliable Transfer*, or *Edmonds*. Instead, it makes the non-jurisdictional argument that these cases do not "require" or "support" the Eleventh Circuit's result or "inhibit" a different approach. Pet. at 6.

principle of a more equal distribution of justice. 421 U.S. at 401-11, 44 L.Ed.2d at 256-262. In rejecting the same argument Boca Grande makes here – that apportionment of fault will frustrate settlements – the Supreme Court observed:

> [T]he [defendant's] argument is hardly persuasive. For if the fault of the two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] absolve it of all liability. . . . But even if this argument were more persuasive than it is, it could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements and relieves the courts of some litigation.

421 U.S. at 408; 44 L.Ed.2d at 260-261.

As the Eleventh Circuit observed in *Great Lakes*, allowing an action for contribution is also consistent with the Supreme Court's decision in *Edmonds*. "The injured party is assured of full compensation for his damages (less a deduction for any contributory negligence) and is unaffected by any subsequent action among the joint tortfeasors for contribution." 957 F.2d at 1582.

Against this background, the reasoning underlying approaches one and three is the same and the approaches are not in conflict. Both methods further the principle of a more equal distribution of justice by apportioning the liability of multiple wrongdoers according to comparative degrees of fault as required under *Reliable Transfer*, 421 U.S. at 411, 44 L.Ed.2d at 262. Both methods are designed

to prevent a non-settling joint tortfeasor from paying more than his or her adjudicated proportionate share of a judgment or settlement.

Likewise, the first and third approaches both promote safety. No doctrine is more firmly entrenched in the maritime law than the principle that comparative fault apportionment promotes safety by focusing deterrence on the party most responsible for the harm. *See, e.g., Reliable Transfer*, 421 U.S. at 405, n. 11, 44 L.Ed.2d at 259; *Cooper*, 417 U.S. at 110-11, 40 L.Ed.2d at 699-700.

Apparently Boca Grande's contention is that the first and third approaches are inconsistent because they employ different procedures. Pet. at 5-10. The first method allows an action for contribution by a non-settling joint tortfeasor against a settling tortfeasor, while the third precludes such an action in favor of a pro rata adjustment between tortfeasors. Pet. at 6-10.

Boca Grande's conflict argument rests on a superficial and technical distinction, not a real difference. The third and first approaches are not inconsistent. Instead, they merely employ slightly different methods to achieve the same objectives.

Under the first approach, an action for contribution assures that liability among joint tortfeasors is distributed according to comparative degrees of fault. This achieves the goals of a just and equitable allocation of damages and an efficient level of deterrence against future negligence. *Great Lakes*, 957 F.2d at 1581-82. Under the third approach, a non-settling tortfeasor receives a credit for the percentage of the judgment corresponding to the settling defendant's degree of fault. This credit makes a

contribution action unnecessary, because the credit protects the non-settling defendant from paying more than his or her proportionate share of the judgment. It also encourages deterrence by requiring negligent parties to pay their fair share.

Thus, under both approaches, the goals of achieving a more equitable distribution of justice and an efficient level of deterrence are realized. While the first and third approaches may differ somewhat in the means they employ to these ends, the identity of purposes and results under both approaches demonstrates the real and intolerable conflict required for certiorari review is not presented here.

2. Neither the circuits nor the Alabama Supreme Court have adopted the second approach exclusively.

That the first and third approaches are consistent with each other is fatal to Boca Grande's petition. Neither the circuits nor the Alabama Supreme Court have adopted the second method exclusively. For this reason, even if Boca Grande is correct in its assertion that the first approach is inconsistent with the second, the failure of any jurisdiction to adopt the second approach exclusively eliminates the possibility of a true conflict.

The cases demonstrate that the courts have adopted the first or third approach exclusively or combinations of the three approaches. *Great Lakes*, 957 F.2d at 1581-83 (adopting first approach); *Associated Electric Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991) (adopting third approach); *Miller*, 887 F.2d at 903-08

(not deciding between second and third approaches). In *Hardy v. Gulf Oil Corp.*, 949 F.2d 826, 835-36 (5th Cir. 1992), a decision more recent than the Fifth Circuit cases cited by Boca Grande,[4] the Court acknowledged its position is "uncertain," with cases following both the second and third approaches. Even Boca Grande's cases acknowledge this intramural division in the Fifth Circuit. *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, ___ So.2d ___, (Ala. 1993), A 33-34; *In Re: The Glacier Bay*, 1993 AMC 1530, 1534, n.10 (D. Alaska 1993).

The two district court decisions cited by Boca Grande, *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991), and *In Re: The Glacier Bay*, also fail to set up the requisite jurisdictional conflict. Neither decision adopts the second approach exclusively. *Stanley*, 781 F. Supp. at 221-26 (adopting combination of second and third approaches, depending upon which method more favorable to *non*-settling defendant); *Glacier Bay*, 1993 AMC at 1536-38 (rejecting second approach and adopting third). In any event, because *Stanley* and *Glacier Bay* are trial rather than appellate level decisions, neither can serve as a basis for establishing conflict jurisdiction under Rule 10.

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[4] The older Fifth Circuit decisions cited by Boca Grande are *Rollins v. Cenac Towing Co.*, 938 F.2d 599 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1242, 117 L.Ed.2d 474 (1992), *Hernandez v. N/V Rajaan*, 841 F.2d 582 (5th Cir.), *cert. denied*, 488 U.S. 981, 109 S.Ct. 530, 102 L.Ed.2d 562 (1988), and *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Boca Grande's reliance on *Amerada Hess* is also misplaced. If and when *Amerada Hess* becomes a final decision of the Alabama Supreme Court within the meaning of Rule 10, it still cannot present a jurisdictional conflict. *Amerada Hess* adopts the third approach, which is consistent with the first approach adopted by the Eleventh Circuit in the instant case. *Amerada Hess* specifically rejects the second approach which Boca Grande urged below. A 42-44.[5]

In short, not *one* of the courts on which it now relies has adopted exclusively the extreme position Boca Grande took below. Indeed, only three courts – the Fifth Circuit, the Ninth Circuit, and the Southern District of New York – purport to follow *any* version of the second approach. Because the first approach the Eleventh Circuit follows is consistent with the third approach, and because neither the circuits nor the Alabama Supreme Court have adopted the second approach exclusively, the conflict Boca Grande describes does not exist. In the absence of a square and irreconcilable conflict, certiorari should be denied.

It is not surprising that the second approach, the only method Boca Grande urged below, has not won widespread support. The second approach violates *Reliable*

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[5] *Amerada Hess* is the only assertedly conflicting case relied on by Boca Grande that had not already been decided when the Supreme Court denied certiorari in *Great Lakes*. Although *Amerada Hess* was available to Boca Grande to present in a petition for rehearing or suggestion of rehearing *en banc* in the Eleventh Circuit, Pet. at 7, Boca Grande declined to do so, presumably because it had never urged the third approach *Amerada Hess* adopts.

Transfer's principle of "a fair and equitable" allocation of damages, 421 U.S. at 411, 44 L.Ed.2d at 262, because it makes it possible for a non-settling tortfeasor to bear a disproportionately greater amount of damages, far in excess of culpability, merely because the plaintiff decides to settle with another tortfeasor. *Great Lakes*, 957 F.2d at 1582. The second approach also creates an incentive for collusion between the plaintiff and one or more tortfeasors to take advantage of a joint tortfeasor with a deeper pocket. *See Miller*, 887 F.2d at 905.

This very harm was one of the reasons the Supreme Court rejected the common law rule of no contribution in *Cooper*. As the Seventh Circuit has recognized,

> [the second approach] would be contrary to the spirit of contribution, since it would allow guiltier defendants to get off cheaply by settling first. The consequences of the race to settle to the loser of the race are among the reasons for finding the old common law rule of no contribution objectionable.

Donovan v. Robbins, 752 F.2d 1170, 1181 (7th Cir. 1985).

The second approach also does violence to the goal of encouraging safety and deterring negligence. If maritime defendants can avoid the true measure of their liability by making quick settlements, the deterrent effect of comparative fault will be negated. On the other hand, if maritime tortfeasors are required to bear responsibility for the portion of the damages caused by their own negligence, an efficient level of deterrence against future negligence is assured. *Great Lakes*, 957 F.2d at 1582.

Contrary to Boca Grande's suggestion that the second approach will encourage settlement and bring a quick end to litigation, logic indicates the second approach will promote quick but only partial and often unjust settlements, ultimately delaying resolution of the entire case. Under the second option, once a plaintiff settles with one defendant, there is no incentive to settle with the non-settling defendant, because the plaintiff need establish only one percent of fault on the non-settling tortfeasor's part to recover the entire judgment. This reality will delay the final disposition of lawsuits, contrary to the goal of full and complete settlements Boca Grande espouses. *Cf. Reliable Transfer*, 421 U.S. at 408, 44 L.Ed.2d at 260 ("[I]f the fault of two parties is markedly disproportionate, it is in the interest of the slightly negligent party to litigate the controversy in the hope that . . . a court [will] . . . absolve it of all liability").

Finally, even if the first approach has a slight deterrent effect on full and complete settlements,[6] the Supreme Court has expressed a preference for the principle of a more equal distribution of justice. "[The argument against comparative fault] asks us to continue the operation of an archaic view because its facile application out of court yields quick, though inequitable, settlements,

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[6] As the Eleventh Circuit observed, "the deterrent effect on settlements [under the first approach] . . . is far from clearly established," particularly when compared to application of the second approach with a good faith requirement. *Great Lakes*, 957 F.2d at 1582. This version of the settlement bar rule is described in *Miller* and, in contrast to the position Boca Grande took below, it is one of the approaches Boca Grande now adopts. Pet. at 5-10.

and relieves the courts of some litigation." *Great Lakes*, 950 F.2d at 1582, quoting *Reliable Transfer*, 421 U.S. at 408, 44 L.Ed.2d at 261.

C. Boca Grande's argument in favor of both the second and third approaches is not properly before the Supreme Court for review

The previous discussion assumes Boca Grande's broad argument in favor of *either* the second *or* the third approach is now properly before the Supreme Court. Review of the record shows, however, that Boca Grande took a different, inconsistent position below, and that it has never before made the amorphous argument it now advances. Boca Grande should not be permitted at this late stage to discard its previous argument in favor of a new, contradictory stance simply because it is expedient for it to do so in its attempt to depict a conflict for review on certiorari.

As noted, Boca Grande previously argued in favor of a harsh form of the second approach under which a settlement acts as an absolute bar to any contribution in favor of a joint tortfeasor who has been saddled with more than his or her fair share of damages. RA 4-5. Boca Grande specifically opposed a more moderate variation of the second approach recognized in the Restatement and *Miller* under which the settlement must be shown to be in good faith and not a product of collusion between the settling parties. RA 6-13. As for the third approach, Boca Grande did not even mention it below, much less support it. RA 4-13. Having never before made a broad, unqualified argument in favor of *both* forms of the second

approach *and* the third approach, Boca Grande should not be heard to take such a position now.

CONCLUSION

Only last term, the Supreme Court denied certiorari in *Great Lakes* under circumstances identical to the situation presented here. Nothing has changed since that time to dictate a different result. Contrary to Boca Grande's claim, review of the relevant cases shows there is no true jurisdictional conflict or other basis under Rule 10 for reviewing the issue of contribution against a settling maritime tortfeasor. Boca Grande's petition for a writ of certiorari should be denied.

STUART C. MARKMAN
KYNES & MARKMAN, P.A.
100 S. Ashley Drive,
Suite 1300
Post Office Box 3396
Tampa, FL 33601-3396
(813) 229-1118
Attorneys for Florida Power and Light Company, Inc., Respondent

CONTENTS OF APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

IN THE MATTER OF THE COMPLAINT OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E

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CASE NO. 88-1636-Civ-T-17A

IN ADMIRALTY

MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS OF FLORIDA POWER & LIGHT COMPANY AND THE O'DAY CORPORATION

Boca Grande Club, Inc., Plaintiff, moves the court for entry of an order granting summary judgment as to the claims of Florida Power & Light Company (FPL) and The O'Day Corporation (O'Day) for indemnity or contribution. Boca Grande Club would show to the Court that there do not exist in this case any disputed facts with respect to the claims of FPL and O'Day for indemnity or contribution and, accordingly, summary judgment is appropriate as a matter of law. Rule 56, *F. R. Civ. P.*

Memorandum in Support of Motion

This limitation action was started by Boca Grande Club as a result of the deaths of Dr. Polackwich and Jonathan Richards when the mast of the sailboat they were operating in the navigable waters of Gasparilla Pass

contacted a high voltage electric transmission line. The claims of the estates of Dr. Polackwich and Jonathan Richards as well as the claims of others (heretofore and herein called collectively "Stipulating Claimants") filing claims in the limitation action as a result of the deaths have been settled by Boca Grande Club. This Court, in its order of March 13, 1991, dismissed with prejudice all the claims, with two exceptions, arising out of the deaths. The two remaining claims are those of FPL and O'Day for "indemnity and contribution." (See doc. 10 and 11). In its order of March 13th the Court stayed further proceedings in this limitation action until resolution of state court actions brought by the Stipulating Claimants in Palm Beach County. The Court permitted Boca Grande Club to file a motion for summary judgment as to the claims of FPL and O'Day for indemnity and contribution.

Boca Grande Club will demonstrate in this memorandum that neither FPL nor O'Day ever had actions for indemnity. Boca Grande Club will also demonstrate that the settlement it made with the Stipulating Claimants effectively bars any action that FPL and O'Day may have had for contribution. Because FPL and O'Day have no claims upon which this Court may grant relief, summary judgment is particularly appropriate. Rule 12, *F. R. Civ. P.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct Court 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

A. The Indemnity Claims.

Both FPL and O'Day have asserted claims for indemnity. It is fundamental that indemnity arises only out of a contract which provides for one to indemnify another or out of a relationship whereby one party, who is without fault, may nevertheless become vicariously liable for the negligence of another. An example is the relationship of master and servant. See generally, Prosser & Keeton, The Law of Torts, (5th ed 1984), §51. There is no contract between Boca Grande Club and FPL or O'Day. Accordingly, contract can furnish no basis for the indemnity claims of FPL and O'Day.

Similarly, there is no relationship between Boca Grande Club on the one hand and either FPL or O'Day on the other out of which FPL or O'Day would be held vicariously liable for any wrongdoing of Boca Grande Club. No such relationship was alleged and none exists. If FPL or O'Day are ultimately found to be liable to the Stipulating Claimants it will be because of the act or omission of FPI [sic] or O'Day Corporation and not because of an act or omission of Boca Grande Club.

At one time a third theory of indemnity, known as the concept of active-passive negligence, prevailed in maritime cases. That theory permitted a wrongdoer who was merely passively negligent to obtain indemnity from an actively negligent party. The active-passive negligence theory of indemnity no longer prevails. It was rejected by the United States Court of Appeals for the Fifth Circuit in *Loose v. Offshore Navigation, Inc.*, 670 F. 2d 493, 500-502 (5th Cir 1982). Rejection of the doctrine was approved by

the United States Court of Appeals for the Eleventh Circuit in *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540, 1556-1557 (11th Cir 1987). Even were the active-passive theory still viable it would not support indemnity in this case because the liability of FPL and O'Day will depend on the acts of each and not on the acts of some other party.

Neither FPL nor O'Day have alleged any facts which would support indemnity and there is in fact no basis for indemnity in this case. Accordingly, the Court should forthwith grant summary judgment in favor of Boca Grande Club as to the indemnity claims of FPL and O'Day.

B. The Contribution Claims.

FPL and O'Day also assert claims for contribution against Boca Grande Club. Each has alleged that if it is found liable to the Stipulating Claimants then it is entitled to contribution from Boca Grande Club. It is the position of Boca Grande Club that pursuant to the law of the Eleventh Circuit the settlement it made with the Stipulating Claimants effectively bars claims for contribution by non-settling tortfeasors such as FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540 (11th Cir 1987); *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller,* 1990 A.M.C. 2247 (M.D. Fla. 1990).

The contribution claims of FPL and O'Day are maritime claims which are governed by maritime law. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.,* 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed 2d 694 (1974); *Self v. Great Lakes Dredge &*

Dock Company, 832 F. 2d 1540, 1547 (11th Cir 1987); *Daughtry v. Diamond M Company,* 693 F. Supp 856 (C.D. Cal. 1988).

In *Self,* the Eleventh Circuit held:

> Under the principle announced in *Luke v. Signal Oil & Gas Co.,* 523 F. 2d 1190 (5th Cir 1975), contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and been released by the claimant. 832 F. 2d at 1547.

Following the Eleventh Circuit's decision in *Self,* that case came back to the district court to resolve the claim of Great Lakes Dredge & Dock Company for contribution from Chevron Shipping Company. Chevron had many years previously settled with the plaintiffs and obtained a release. Great Lakes nevertheless claimed contribution from Chevron because Great Lakes paid a greater share to the injured parties than its proportionate share of fault. Chevron moved for summary judgment on Great Lakes contribution claim and argued that *Self* held that no actions for contribution could be brought against a settling tortfeasor. The Court agreed and granted Chevron's motion for summary judgment. *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller,* 1990 A.M.C. 2247 (M.D. Fla. 1990).

In this case Boca Grande Club has settled with the Stipulating Claimants. A copy of the release given to Boca Grande Club is attached as Exhibit A. That settlement bars the claims of FPL and O'Day for contribution. Accordingly, the Court must forthwith enter summary judgment in favor of Boca Grande Club as to the contribution claims of FPL and O'Day.

C. Good Faith Settlement.

FPL objected to the Joint Motion and Stipulation filed by Boca Grande Club and the Stipulating Claimants which sought an order of dismissal of the claims of the Stipulating Claimants and the stay of further proceedings in the limitation action. The basis for FPL's objection to the settlement was stated by FPL as follows:

> . . . Florida Power & Light Company cannot agree to dismissal of any claims upon any terms which effect the claims filed by Florida Power & Light Company. Specifically, any Court Order which purports to pass upon the settlement should not operate to foreclose Florida Power & Light Company from later challenging the settlement, particularly if the alleged 'good faith' nature of the settlement is used as a premise for Boca Grande Club, Inc.'s subsequent motion for summary judgment on Florida Power & Light Company's claims for contribution and/or indemnity. (Florida Power & Light Company's Memorandum In Response To Stipulation And Joint Motion For Dismissal, p. 3).

FPL cited no authority for the proposition that a settlement must be demonstrated to be in good faith before it effectively bars claims for contribution. At the hearing before the magistrate FPL articulated the same point quoted above, again, without referring the magistrate to any authority to support the proposition. Given the position that FPL has taken it is assumed that FPL will oppose this motion for summary judgment as to the contribution claims upon the grounds that this Court has not determined that the settlement between Boca Grande

Club and the Stipulating Claimants was made in "good faith."

The term "good faith" is susceptible of many meanings. FPL has yet to divulge precisely what it conceives is encompassed by its use of the phrase. The settlement between Boca Grande Club and the Stipulating Claimants was made in "good faith" from the perspective of both Boca Grande Club and the Stipulating Claimants. The settlement was made in the open, without any collusive purpose or ulterior motive. From the perspective of Boca Grande Club, the club settled a case in which it did not deem itself to be responsible and in which it believed ultimately it would be found to be free of fault, in order to extricate itself from a time consuming and expensive lawsuit. From the perspective of the Stipulating Claimants, they received a sizeable amount of money from a party that they had not sued in their state court actions, in order to remove themselves from a limitation proceeding that potentially restricted and seriously complicated the prosecution of their actions against the parties they considered to be primarily liable; i.e., the defendants in the state court actions. (Boca Grande Club was not initially sued in the state court actions by the Stipulating Claimants. Boca Grande Club was brought into those actions by the third party complaint of FPL asking for indemnity and contribution.)

In so far as concerns the effect of the settlement upon the remaining claims of FPL and O'Day for contribution, it is the position of Boca Grande Club that the settlement bars contribution. It is the position of Boca Grande Club that it is not necessary for Boca Grande Club to endeavor to unilaterally demonstrate that the settlement was in

"good faith" in any sense, nor is it necessary that the district court hold a hearing or trial to determine whether or not the settlement was made in "good faith." The fact that there has been a settlement and release given to Boca Grande Club is sufficient to bar the contribution claims of FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company,* 832 F. 2d 1540 (11th Cir 1987).

Courts outside of the Eleventh Circuit have dealt with the concept of good faith in deciding what effect a settlement will have on contribution claims in maritime cases. The opinions in *Miller v. Christopher,* 887 F. 2d 902 (9th Cir 1989) and *Commercial Cleaning Corporation v. Allied Chemical Company,* 206 Cal App 3d 1066, 254 Cal Rptr 401, 1989 A.M.C. 769 (1988, 4th Dist.) provide useful background to the different theories as to the effect a settlement has on claims for contribution by non-settling parties. (Because the opinion in *Commercial Cleaning Corporation v. Allied Chemical Company* was withdrawn by the California Supreme Court that opinion cannot be considered as precedent. See *Great Lakes Dredge & Dock Company v. Tanker Robert Miller,* 1990 A.M.C. 2254, 2249, n 1 (M.D. Fla. 1990). Nevertheless, the opinion is most useful and is entitled, at least, to the consideration given to a relevant text or law review article.)

Both opinions discuss at length the three potential solutions to the problem presented in a situation where one of a number of defendants enters into a settlement with the plaintiff. The alternatives are set out in Restatement (Second) of Torts §886 A, comment m. The second alternative is that:

> (2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution.

The courts in *Commercial Cleaning* and *Miller v. Christopher* both recognized that the Eleventh Circuit, in *Self v. Great Lakes Dredge & Dock Company, supra,* elected to follow the quoted alternative; namely, that settlement extinguishes rights to contribution by the remaining defendants. *Miller v. Christopher,* 887 F. 2d 902, 905-906 (9th Cir 1989); *Commercial Cleaning Corporation v. Allied Chemical Company,* 1989 A.M.C. 769, 778-789 (4th Dist 1988). The Restatement comment notes that the second alternative favors the settling tortfeasor and suggests that a requirement of good faith may be necessary, but then concludes:

> But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, *the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated.* See 1989 A.M.C. at 775 (Emphasis added).

In other words, a requirement that there be a demonstration that a settlement comports with some pre-established criteria of "good faith" will effectively dilute the finality of settlement. If there can be no certainty and finality as a result of a settlement there can be no incentive to settle in the first place.

It is very clear that the Eleventh Circuit, in selecting the second alternative, was very conscious of the fact that a non-settling tortfeasor could end up paying more or

less than its judicially determined proportionate share of a loss. On this point the court held:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case *and that in the absence of a settlement,* the amount of contribution turns on the percentage of fault of each joint tortfeasor.
>
> * * *
>
> We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and non-settling tortfeasor in maritime personal injury actions. 832 F. 2d at 1547-1548 (Emphasis added).

Significantly, the Court in *Self* did not tack on to the rule that contributions cannot be obtained from settling tortfeasors a requirement that there must be a demonstration that the settlement was in "good faith." Implicit in the Eleventh Circuit's decision in *Self* is the rejection by that court of the concept that a settlement, to act as a bar against claims for contributions by non-settling tortfeasors, must reasonably represent the ultimate degree of proportionate fault of the settling tortfeasor. *Cf. Leger v. Drilling Well Control, Inc.*, 592 F. 2d 1246 (5th Cir 1979). *Leger* was rejected by the Eleventh Circuit. *Self*, 832 F. 2d at 1547-1548.

By contrast, the United States Court of Appeals for the Ninth Circuit in *Miller v. Christopher*, 887 F. 2d 902 (9th Cir 1989) affirmed a determination of the district court

that the settlement reached in that case was made in good faith and therefore barred claims for contribution from the settling tortfeasors. The Ninth Circuit approved the district court's use of California law to apply the standard for determining whether the settlement was in good faith, notwithstanding the fact that the court pointed out that in maritime cases state law is not controlling. 887 F. 2d at 905.

The difference between the rule developed in *Self* and the approach taken by the Ninth Circuit in *Christopher* is obvious. Under the *Self* rule a settlement, without more, bars contribution claims against the settling tortfeasor. Under the *Christopher* approach it is necessary for the district court to conduct an evidentiary hearing in an effort to approximate the value of the plaintiff's claim and to evaluate the relative degrees of fault among the defendants. After this expenditure of labor there may follow an appeal with a full review by the appellate court of the actions of the district judge. Clearly this is an impractical approach. Boca Grande Club submits that the *Christopher* approach is wasteful and unworkable. Obviously, no rational party would pay several hundred thousand dollars to settle his dispute with a plaintiff if the result was that he had to participate in a trial to ascertain whether the settlement met a "good faith" criteria followed by an appeal taken by a disgruntled non-settling tortfeasor trying to protect its right of contribution.

In *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller*, 1990 A.M.C. 2247 (M.D. Fla. 1990), Great Lakes sought to avoid the effect of the settlement bar rule of *Self* by arguing that the court should determine relative

degrees of fault between the various tortfeasors. The district court refused and noted:

> The matters in need of resolution in order to determine contribution are so voluminous that to resolve them, if they are resolvable at all, would involve the staging of the trials that the parties sought to avoid through settlement. Great Lakes labeled 'unworthy of consideration' Chevron's argument concerning this burden. The Court views the matter otherwise. Setting aside the destructive impact on future settlements that the precedent of such a trial would have,. . . . the Court is persuaded that Great Lakes' proposal would invest an enormous amount of judicial resources in an essentially futile enterprise. In addition to the criticism leveled previously herein, the Court observes that the persons with the greatest knowledge of the relevant issues are the claimants who have settled their claims, and those persons no longer are parties to these actions. Their absence from the proposed proceedings would reduce the reliability and accuracy of the determinations reached; their presence would be an unjustified burden. 1990 A.M.C. at 2253, n 4.

If a settlement between a plaintiff and one of several tortfeasors in a maritime personal injury case is subject to judicial inquiry to determine whether or not it is in "good faith" or reasonable in light of the ultimate value of the plaintiff's claims and the potential liability of the various defendants, which determination will obviously be subject to appeal, then there will be few if any settlements concluded. A settlement subject to "good faith" will not permit the settling party to close his file and know that his involvement in the controversy is at an end. That is

true even if the district courts had the manpower and time to judicially oversee settlements and the appellate courts resources ample to review all such determinations of the trial courts. The rule developed by the Eleventh Circuit in *Self* is simple, reasonable and practical. It permits a settling tortfeasor to close his file knowing that all claims for contribution against him are barred; he is no longer involved in the controversy and need have no concerns about its ultimate outcome. That rule must be applied to the settlement between Boca Grande Club and the Stipulating Claimants and summary judgment must be awarded in favor of Boca Grande Club as to the claims for indemnity and contribution of FPL and O'Day.

D. <u>The Settlement has Been Approved.</u>

The settlement between Boca Grande Club and the Stipulating Claimants has been approved by the principal claimants and the Circuit Court for Palm Beach County. Attached as Exhibit B is a copy Motion for Approval of Settlement filed (in the Circuit Court for Palm Beach County) by Stephanie J. Polackwich and Alan S. Polackwich, Sr., two of the Stipulating Claimants. These claimants point out to the court that the settlement is in the best interest of "all claimants and survivors." Attached to the motion are the affidavits of individual Stipulating Claimants in which they inform the Circuit Court that they confirm their agreement to the settlement and the manner in which they have agreed to distribute the settlement proceeds. Each asks the Circuit Court to approve the settlement.

Boca Grande Club has been informed that the Circuit Court has held a hearing on the motion asking for approval of the settlement and thereafter entered an Order approving of the settlement. A copy of that order has been requested and will be filed upon receipt by Boca Grande Club.

Boca Grande Club submits that approval of the settlement by the Circuit Court establishes that the settlement was in "good faith" even though such approval is not necessary under the rule of *Self v. Great Lakes Dredge & Dock Co.*, 832 F. 2d 1540 (11th Cir 1987).

Conclusion

In view of the foregoing the Court should forthwith enter an order determining that neither Florida Power & Light Company nor The O'Day Corporation have claims for indemnity against Boca Grande Club, Inc. The order should further provide that the settlement between Boca Grande Club, Inc. and the individual Stipulating Claimants bars any claims for contribution that Florida Power & Light Company and The O'Day Corporation may otherwise have had. Upon the authority of *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540 (11th Cir 1987) and the other authorities cited above, summary judgment should be entered in favor of Boca Grande Club, Inc. and against Florida Power & Light Company and The O'Day

Corporation upon the claims for indemnity and contribution.

Respectfully submitted,

MACFARLANE, FERGUSON,
ALLISON & KELLY

/s/ Jack C. Rinard
Jack C. Rinard, Esquire
Florida Bar No. 095376
Post Office Box 1531
Tampa, Florida 33601
(813) 223-2411
Attorneys for Boca Grande
Club, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. mail this 29th day of April, 1991 to Christian D. Searcy, Esquire, Searcy, Denney, Scarola, Barnhart & Shipley, P.A., Post Office Box Drawer 3626, West Palm Beach, Florida 33402, Tony Cunningham, Esquire, Wagner, Cunningham, Vaughan and McLaughlin, 708 E. Jackson Street, Tampa, Florida 33602, Nathaniel G. W. Pieper, Esquire and James F. Pingel, Jr., Esquire, Post Office Box 838, Tampa, Florida 33601 and C. Steven Yerrid, Esquire and Christopher S. Knopik, Esquire, Yerrid, Knopik & Valenzuela, P.A., 101 E. Kennedy Boulevard, Barnett Plaza, Suite 2160, Tampa, Florida 33602.

/s/ Jack C. Rinard
JACK C. RINARD

NO. 93-180

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOINT APPENDIX

JACK C. RINARD
MACFARLANE FERGUSON
(Counsel of Record)
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200
Counsel for Petitioner

STUART C. MARKMAN
KYNES & MARKMAN, P.A.
(Counsel of Record)
Post Office Box 3396
Tampa, Florida 33601
(813) 229-1118
Counsel for Respondent

Petition for Certiorari Filed August 4, 1993
Certiorari Granted September 28, 1993

CONTENTS OF APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA (TAMPA)

CIVIL DOCKET FOR CASE #: 88-CIV-1636

BOCA GRANDE CLUB, et al
v.
POLACKWICH, et al

FILED: 10/20/88

Relevant Docket Entries

10/20/88	1	COMPLAINT filed (grk) [Entry date 10/31/91]
12/2/88	10	ANSWER and affirmative defenses to Complaint and CLAIM by Florida Power/Light (grk) [Entry date 10/31/91]
12/2/88	11	ANSWER to Complaint and CLAIM by O'Day Corporation (grk) [Entry date 10/31/91]
12/12/88	12	ANSWER and Affirmative Defenses to Claim of Florida Power and Light Company by Boca Grande Club (grk) [Entry date 10/31/91]
12/12/88	13	ANSWER and Affirmative Defenses to Claim of the O'Day Corporation by Boca Grande Club (grk) [Entry date 10/31/91]
12/30/88	16	ANSWER and Affirmative Defenses to Complaint and CLAIM by Legal Guardian of Robert Nathan Polackwich, Eleanor A. Polackwich, Alphonsus J. Polackwich, Jonathan Richards, deceased, Stephanie Polackwich, Individually and as Personal Representative of the Estate of Jonathan Richards, deceased, Robert

Polackwich, deceased, Alan Polackwich, as Personal Representative of the Estate of Robert J. Polackwich, deceased. (grk) [Entry date 10/31/91]

1/13/89 18 ANSWER to Claim of Claimants by Boca Grande Club (grk) [Entry date 10/31/91]

12/14/90 163 STIPULATION and Joint Motion for dismissal by parties. Proposed Order of Dismissal attached. (grk) [Entry date 11/05/91]

12/14/90 164 MEMORANDUM by Boca Grande Club in support of [163-1] dismiss/dismissal stipulation (grk) [Entry date 11/05/91].

12/27/90 167 RESPONSE by Florida Power/Light to [163-1] dismiss/dismissal stipulation (grk) [Entry date 11/05/91]

3/13/91 173 ORDER that the Joint Motion for dismissal is GRANTED, and all claims of the stipulating Claimants against the Plaintiff only are dismissed with prejudice. Further prosecution of this limitation action is hereby STAYED until the state court lawsuits have been terminated. The only exception is that Plaintiff may, within 45 days from the date of this Order, file motions for summary judgment as to claims of Florida Power and Light and the O'Day Corporation which seek indemnity and contribution. Florida Power and O'Day Corporation will respond to any such motions filed by Plaintiff in accordance with Local Rules. The Order on motion for Injunction and Injunction (#55) is hereby LIFTED as to each of the stipulating Claimants and and each stipulating Claimant is free to pursue whatever actions

he or she may have against parties other than Boca Grande Club. All pending discovery motions are DENIED. The entry of this Order does not make any determination as to the good faith of the settlement between Plaintiff and stipulating Claimants. Boca Grande and stipulating Claimant shall bear own costs. (Signed by Judge Elizabeth A. Kovachevich) (grk) [Entry date 11/06/91] [Edit date 11/06/91]

4/29/91 174 MOTION by Boca Grande Club for summary judgment as to claims of Florida Power & Light Company and the O'Day Corporation Exhibits attached. (grk) [Entry date 11/06/91]

5/16/91 178 MEMORANDUM by Florida Power/Light in opposition to [174-1] motion for summary judgment as to claims of Florida Power & Light Company and the O'Day Corporation (grk) [Entry date 11/06/91]

3/6/92 184 ORDER granting [174-1] motion for summary judgment as to claims of Florida Power & Light Company and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estates of the decedents. The case is ADMINISTRATIVELY CLOSED pending the outcome of the bankruptcy proceedings regarding O'Day Corporation. Boca Grande Club, Inc. shall report to the Court upon the conclusion of the bankruptcy proceedings. (Signed by Judge William J. Castagna) (cr) [Entry date 03/27/92]

3/27/92 185 JUDGMENT that Boca Grande's motion for summary judgment as to the claims of Florida Power

and Light Company is granted and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estate of the decedents. (cr) MFR Number 102:1499 (cr)

7/19/93 196 JUDGEMENT OF USCA (certified copy) Re: [187-1] appeal vacating judgment and remanding case to district court for further proceedings in accordance with opinion. Mandate date: 7/15/93 USCA EOD: 5/12/93 (gw) [Entry date 07/21/93]

UNITED STATES COURT OF APPEALS
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NUMBER: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E

COMPLAINT

Boca Grande Club, Inc. as owner of a 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E as and for its complaint in a cause of exoneration from or limitation of liability, civil and maritime, alleges upon information and belief as follows:

1. This is an admiralty and maritime action within the meaning of 28 USCA §1333 and Rule 9(h), Federal Rules of Civil Procedure.

2. Plaintiff, Boca Grande Club, Inc., was at all times material hereto a corporation organized and existing under the laws of the State of Florida, and was engaged in the business, among others, of owning and renting to its members 16' Prindle Catamaran sailing vessels.

3. At all times material hereto, Boca Grande Club, Inc. was the owner of a 16' Prindle Catamaran sailing vessel, Hull No. SUR06214M82E.

4. The 16' Prindle Catamaran sailing vessel, Hull No. SUR06214M82E was a twin hulled fiberglass sailing vessel 16' in length, built at Santa Ana, California in 1982. At all times herein mentioned, the 16' Prindle Catamaran Sailing Vessel Hull No. SUR06214M82E was in all respects seaworthy, properly and efficiently supplied, equipped and furnished, well and sufficiently fitted with suitable machinery, tackle, apparel, appliances, et cetera, all in good order and condition except as otherwise specifically stated herein, and suitable for the business for which it was built.

5. On or about Saturday, April 23, 1988, at approximately 1200, Robert Polackwich, who was a member of the Boca Grande Club, Inc., rented the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E for use during a private pleasure voyage. Accompanying Robert Polackwich on the private pleasure voyage was his stepson, Jonathan Richards.

6. At approximately 1400 on Saturday, April 23, 1988, in the vicinity of certain navigable waters commonly known as Gasparilla Pass, the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E, being operated as aforesaid, came into contact with high voltage electric power/transmission lines owned, operated and maintained by Florida Power & Light Corporation. As a result of the contact, Robert Polackwich and Jonathan Richards were electrocuted.

7. The contact between the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR0621M82E's mast and the electric power/transmission lines that resulted in the deaths of Robert Polackwich and Jonathan Richards was solely caused by the neglect, fault, and want of care of the operator of said vessel, and/or the neglect, fault and want of care of Florida Power & Light Corporation and/or its failure to maintain its electric power/transmission lines at the height permitted by a permit for such lines granted by the United States Army Corps of Engineers.

8. The contact between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and the electric

power/transmission lines that caused the deaths of Robert Polackwich and Jonathan Richards was not caused or due to any fault, neglect or want of care on the part of Boca Grande Club, Inc., nor was said casualty caused or occasioned by any defect or condition of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E.

9. The contact between the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E's mast and the electric power/transmission lines which resulted in the deaths of Robert Polackwich and Jonathan Richards was without the privity or knowledge of Boca Grande Club, Inc.

10. The personal representative of Robert Polackwich commenced a lawsuit against Boca Grande Club, Inc., among others, in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, Case No. CL88-5328 AI. On June 9, 1988, copies of a Petition For Temporary Injunction, Motion For Emergency Hearing, and a Notice Of Hearing were furnished to counsel for Boca Grande Club, Inc.

11. Having learned that the personal representative of Robert Polackwich seeks to recover damages against the owner of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E, Boca Grande Club, Inc., Plaintiff herein, has commenced this action to obtain exoneration from any liability as owner of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E to the value of said vessel following the April 23, 1988 contact between it's mast and the electric power/transmission lines, all in accordance with the provisions of Title 46, United States Code, Sections 181, et seq.

12. There are no demands, unsatisfied liens, or claims of liens against the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E, or Plaintiff, arising out of the April 23rd contact between the vessel's mast and the electric power/transmission lines that caused the deaths of Robert Polackwich and Jonathan

Richards, or any suits pending against the vessel or its owner, so far as is known to Plaintiff.

13. This Complaint is filed within six months after the date Plaintiff first received written notice evidencing an intent to make a claim against the owner of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E as a result of the above described casualty.

14. The value of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E following the above described casualty does not exceed the sum of $1,000.00. At the time of the casualty, there was no freight pending within the meaning of the applicable statutes. Attached hereto as Exhibit A is an Affidavit of Value of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E following the casualty. Plaintiff asserts that the aggregate value of its interest in the vessel so stated is in compliance with the statutes of the United States.

15. Boca Grande Club, Inc. elects to file herein an Ad Interim Stipulation with good and sufficient surety, as required by the rules of this Court and the aforementioned statutes of the United States, in the amount of $1,000.00, with interest thereon at the rate of 6% per annum from the date thereof, for the payment of Plaintiff's aggregate interest in the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E into Court.

16. All and singular the premises are true and correct and within the exclusive admiralty and maritime jurisdiction of this Court.

WHEREFORE, Boca Grande Club, Inc. prays:

1. That the Court approve its Ad Interim Stipulation as sufficient security for the payment into Court upon judgment of the amount of its interest in the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E.

2. That the Court enter an order directing the issuance of a notice citing all persons claiming any interest herein or damages for any loss or injury as a result of the contact between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and the electric power/transmission lines on April 23, 1988, citing them to file their respective claims and their answers to this Complaint with the Clerk of the Court and to serve copies thereof upon Plaintiff, all as required by the rules of this Court.

3. That the Court enter an order prohibiting and restraining the commencement and prosecution of any suit, action or legal proceeding of any nature, kind or description whatsoever against Plaintiff except in the present proceeding in respect of any claim or claims arising out of the aforesaid contact between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and the electric power/transmission lines.

4. That Plaintiff have such other and further relief as may appear just in the premises.

/s/ _____

David F. Pope
D. James Dadyk
MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O Box 1531
Tampa, Florida 33601
Telephone: 813/223-2411
Attorneys for Plaintiff

(Verification omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION OF
LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL, HULL
NO. SUR06214M82E

ANSWER, AFFIRMATIVE DEFENSES AND CLAIM OF FLORIDA POWER AND LIGHT COMPANY

Defendant, Florida Power and Light Company, answers the Complaint for Exoneration From or Limitation of Liability previously filed by Boca Grande Club, Inc. as follows:

1. Without knowledge.

2. Without knowledge.

3. Without knowledge.

4. Denied that the 16' Prindle Catamaran sailing vessel "was in all respects seaworthy, properly and effeciently [sic] supplied, equipped and furnished, well and sufficiently fitted with suitable machinery, tackle, apparel, appliances, et cetera, all in good order and condition except as otherwise specifically stated herein, and suitable for the business for which it was built"; otherwise without knowledge.

5. Without knowledge.

6. Without knowledge.

7. Denied.

8. Denied.

9. Denied.

10. Without knowledge.

11. Admitted.

12. Without knowledge.

13. Without knowledge.

14. Without knowledge.

15. Without knowledge.

16. Admitted that such a Complaint for Exoneration From or Limitation of Liability is within the 'admiralty and maritime jurisdiction of this Court"; otherwise denied.

AFFIRMATIVE DEFENSES

Florida Power and Light Company further raises the following affirmative defenses to the Complaint for Exoneration From or Limitation of Liability:

1. The alleged accident involving contact between electric power/transmission lines and the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E ("the Vessel") on April 23, 1988 was caused in whole or in part by the negligence of Plaintiff, Boca Grande Club, Inc., and its agents, servants or

employees or by the unseaworthiness of the Vessel in the following respects:

A. The Vessel was unseaworthy; and/or

B. Boca Grande Club, Inc. and its agents, servants or employees allowed the vessel to be operated by persons who were either improperly trained, incompetent or physically unable to properly operate the Vessel; and/or

C. Boca Grande Club, Inc. and its agents, servants or employees failed to properly train the persons operating the Vessel regarding the proper procedures for operating the Vessel; and/or

D. Boca Grande Club, Inc. and its agents, servants or employees failed to properly warn the persons operating the Vessel of the perils of operating the Vessel in waters with hazardous currents, shoal and shorelines near the site of the alleged accident of April 23, 1988; and/or

E. Boca Grande Club, Inc. and its agents, servants or employees failed to properly outfit, modify or otherwise safeguard the vessel with equipment and appurtenances which would have prevented the alleged accident of April 23, 1988.

Accordingly, Florida Power and Light Company demands that the Claim for Exoneration From Liability be denied on the ground that the accident of April 23, 1988 was caused in whole or in part by the negligence and/or unseaworthiness as set forth above; and that the Claim for Limitation of Liability should be denied on the grounds that the owner of the Vessel, Boca Grande Club, Inc., was privy to and/or had knowledge of the unseaworthiness and also was negligent in failing to prevent the accident.

CLAIM

1. Florida Power and Light Company is a corporation authorized to do business in the State of Florida and at all material times, owned and properly maintained certain electrical transmission lines located near certain waters west of the Boca Grande Causeway commonly known as Gasparilla Pass.

2. The Plaintiff, Boca Grande Club, Inc., is, according to its own allegations, a corporation organized and existing under the laws of the State of Florida, maintaining its business in Boca Grande, Florida, and was engaged in the business, among others, of owning and renting or otherwise permitting its members to use 16' Prindle Catamaran sailing vessels in the area alleged in the Complaint.

3. At all material times, Boca Grande Club, Inc. was the owner of a 16' Prindle Catamaran sailing vessel, Hull No. SUR06214M82E ("the Vessel").

4. On or about April 23, 1988, the Vessel was leased or rented, or otherwise provided to Robert J. Polackwich and Jonathan Richards by agents, servants or employees of Boca Grande Club, Inc. for use during a pleasure voyage in and near the navigable waters known as Gasparilla Pass. During that voyage, the Vessel allegedly contacted electrical transmission lines owned and maintained by Florida Power and Light Company.

5. Florida Power and Light Company has been named as a defendant and has been served with process in a case styled *Alan S. Polackwich, Sr., as Personal Representative of the Estate of Robert J. Polackwich, deceased, vs. Florida Power and Light Company and the O'Day Corporation*, Case No. 88-20398, Division P, in the Circuit Court for the Thirteenth Judicial Circuit of Florida. In that suit, the plaintiff seeks recovery of damages against Florida Power and Light Company for the injuries and death of Robert J. Polackwich allegedly resulting from the electrical contact of April 23, 1988.

6. Florida Power and Light Company has also been named as a defendant and has been served with process in a case styled

Stephanie J. Polackwich, as Personal Representative of the Estate of Jonathan Richards, deceased vs. Florida Power and Light Company and the O'Day Corporation, Case No. 88-20396, Division C, in the Circuit Court for the Thirteenth Judicial Circuit of Florida. In that suit, the plaintiff seeks recovery of damages against Florida Power and Light Company for the injuries and death of Jonathan Richards allegedly resulting from the electrical contact of April 23, 1988.

7. Although it vigorously asserts that the injuries and deaths of Polackwich and Richards are not in any way the result of its fault or negligence, Florida Power and Light Company specifically alleges that it is entitled to indemnity and/or contribution from Boca Grande Club, Inc., among others, for any damages for which Florida Power and Light Company may ultimately be adjudged liable in the above referenced cases. Specifically, Florida Power and Light Company asserts that Boca Grande Club, Inc. was negligent or otherwise at fault for the injuries or damages suffered by Polackwich and Richards in the following respects:

A. Boca Grande Club, Inc. failed to provide Polackwich and Richards with a seaworthy vessel.

B. Boca Grande Club, Inc. failed to properly instruct and/or warn Polackwich and Richards regarding the safe operation of the Vessel in the vicinity where they would reasonably be expected to sail.

C. Boca Grande Club, Inc. failed to take proper steps to determine that Polackwich and Richards were qualified, competent and/or physically able to operate the Vessel.

D. Boca Grande Club, Inc. failed to employ individuals capable of making such determinations.

E. Boca Grande Club, Inc. failed to properly outfit, equip, modify or furnish the Vessel with equipment which would

have prevented the damages complained of.

8. Florida Power and Light Company reserves the right to amend this claim as further discovery and inquiry should dictate.

Accordingly, Florida Power and Light Company files its claim against Boca Grande Club, Inc. for such fees, costs, interest and damages to which it is entitled under the doctrines of contribution and/or indemnity.

/s/ _____
Paul D. Hardy
Florida Bar No. 1898080
C. Steven Yerrid
Florida Bar No. 207594
Christopher S. Knopik
Florida Bar No. 378348
STAGG, HARDY & YERRID, P.A.
One Tampa City Center
Suite 2600
201 N. Franklin Street
Tampa, Florida 33602
(813) 223-4456
Attorneys for Florida
Power and Light Company

(Verification and certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-CIV-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E

ANSWER AND CLAIM OF THE O'DAY CORPORATION

Claimant The O'Day Corporation ("O'Day"), by and through its undersigned attorneys, answers the complaint for exoneration from or limitation of liability of the Boca Grande Club, Inc. ("Boca Grande"), as follows:

1. Admitted.

2. Admitted.

3. Admitted.

4. Without knowledge.

5. Admitted.

6. Admitted.

7. Denied.

8. Denied.

9. Denied.

10. Admitted.

11. Admitted.

12. Without knowledge.

13. Admitted.

14. Denied.

15. Admitted.

16. Admitted that this matter is exclusively within the maritime and admiralty jurisdiction of this Court. The remainder of paragraph 16 is denied.

AFFIRMATIVE DEFENSE

As a separate and complete defense, based upon its information and belief, defendant O'Day states as follows:

FIRST AFFIRMATIVE DEFENSE

For its first affirmative defense, and in further answer to the compliant, O'Day avers that (a) the fatal injuries to Robert Polackwich and Jonathan Richards occurring on April 23, 1988 were caused by the negligence of Boca Grande and its agents, servants or employees and by the unseaworthiness of the 16' Prindle Catamaran and (b) the negligence and unseaworthiness were within the privity and knowledge of Boca Grande.

THEREFORE, O'Day requests this Court to deny Boca Grande's claim for exoneration from or limitation of liability with regard to the 16' Prindle Catamaran.

CLAIM OF THE O'DAY CORPORATION

Claimant The O'Day Corporation ("O'Day), by and through its undersigned attorneys, files this claim against petitioner Boca Grande Club, Inc. ("Boca Grande") and alleges as follows:

1. O'Day is a foreign corporation whose products are sold in the State of Florida.

2. At all material times, O'Day was the business entity that was legally responsible for the proper design, manufacture and sale of the 16' Prindle Catamaran, Hull No. SUR06204M82E.

3. At all material times, Boca Grande was the owner of the 16' Prindle Catamaran.

4. Prior to his death, Robert J. Polackwich ("Polackwich"), was a resident of Hillsborough County, Florida and conducted a professional medical practice in this District.

5. Prior to his death, Jonathan Richards ("Richards") was a resident of this District.

6. On or about April 23, 1988, Polackwich and Richards were sailing onboard the 16' Prindle Catamaran when that vessel contacted overhead power lines on the west side of the Boca Grande Causeway in Charlotte County, Florida.

7. As a result of that collision, Polackwich and Richards suffered fatal injuries.

8. Pursuant to a complaint filed in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, entitled *Alan S. Polackwich, Senior, Personal Representative of the Estate of Robert J. Polackwich deceased vs. Florida Power and Company and The O'Day Corporation*, Case No. 88-20398, which is hereto attached as Exhibit "A" the Personal Representative of Polackwich seeks damages from O'Day because of the fatal

injuries received by Polackwich on April 23, 1988.

9. Pursuant to a complaint filed in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, entitled Stephanie J. Polackwich, as Personal Representative of the Estate of Jonathan Richards, deceased vs. Florida Power and Light Company and The O'Day Corporation, Case No. 88-20396, which is hereto attached as Exhibit "B," the Personal Representative of Richards seeks damages from O'Day because of the fatal injuries received by Richards on April 23, 1988.

10. The fatal injuries received by Polackwich and Richards on April 23, 1988 were caused, in whole or in part, because Boca Grande was negligent in (a) leasing the 16' Prindle Catamaran to Polackwich and Richards and (b) providing them with an unseaworthy vessel.

11. Although O'Day denies that it is legally responsible for the fatal injuries to Polackwich or Richards, O'Day is entitled to indemnity or contribution from Boca Grande if O'Day is found liable to Polackwich or Richards in the above described legal actions.

12. As a result of Boca Grande's negligence, O'Day has been required to obtain the services of the undersigned attorneys and have agreed to pay them a reasonable fee for their services.

WHEREFORE, O'Day demands judgment against Boca Grande for indemnity or contribution for any amount which O'Day is held liable to Polackwich or Richards, together with attorneys fees, interest and costs.

DATED this 2nd day of December, 1988.

/s/ _____
NATHANIEL G. W. PIEPER, ESQ.
and DAVID W. McCREADIE, ESQ.
LAU LANE, PIEPER & ASTI, P.A.

Post Office Box 838
Tampa, Florida 33601-0838
(813) 229-2121
Attorneys for The O'Day
Corporation

(Certificate of service and verification omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

ANSWER AND AFFIRMATIVE DEFENSES TO CLAIM OF FLORIDA POWER & LIGHT COMPANY

Boca Grande Club, Inc., Petitioner/Plaintiff, files this its Answer and Affirmative Defenses to the claim of Florida Power & Light Company.

ANSWER

1. Boca Grande Club, Inc. admits that Florida Power & Light Company is a corporation authorized to do business in the State of Florida and at all material times, owned certain electrical transmission lines located near certain waters west of the Boca Grande Causeway commonly known as Gasparilla Pass. The remaining allegations of paragraph 1 of the Claim are denied.

2. Boca Grande Club, Inc. admits that it is a corporation organized and existing under the laws of the State of Florida, maintaining its business in Boca Grande, Florida, and was engaged in the business, among others, of owning and renting to its members 16'

Prindle Catamaran sailing vessels. The remaining allegations of paragraph 2 of the Claim are denied.

3. The allegations of paragraph 3 of the claim are admitted.

4. Boca Grande Club, Inc. admits that on or about April 23, 1988, the Vessel was rented to Robert J. Polackwich by Boca Grande Club, Inc. for use during a private pleasure voyage. Boca Grande Club, Inc. further admits that during that voyage, the vessel allegedly contacted electrical transmission lines owned and maintained by Florida Power & Light Company. The remaining allegations of paragraph 4 of the Claim are denied.

5. To the extent that paragraph 5 of the Claim alleges factual matters requiring a response from Boca Grande Club, Inc., the same are admitted.

6. To the extent that paragraph 6 of the Claim alleges factual matters requiring a response from Boca Grande Club, Inc., the same are admitted.

7. The allegations of paragraph 7 of the Claim are denied.

7A. The allegations of paragraph 7A of the Claim are denied.

7B. The allegations of paragraph 7B of the Claim are denied.

7C. The allegations of paragraph 7C of the Claim are denied.

7D. The allegations of paragraph 7D of the Claim are denied.

7E. The allegations of paragraph 7E of the Claim are denied.

8. The allegations of paragraph 8 of the Claim are denied.

WHEREFORE, having fully answered, Boca Grande Club, Inc. prays that Florida Power & Light Company's Claim be dismissed, and that Petitioner/Plaintiff recover its costs.

FIRST AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that the Claim of Florida Power & Light Company for indemnity/contribution fails to state a claim upon which relief can be granted against Petitioner/ Plaintiff because no contract providing for indemnity exists between the parties, and Florida Power & Light Company was actively negligent with respect to the casualties at issue.

SECOND AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies the allegations of unseaworthiness of the vessel, and further denies that it was negligent in any way that was a legal cause of the injuries to Robert J. Polackwich and Jonathan Richards.

THIRD AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that at the time and place of the casualty, the sole legal cause of the injuries to Robert J. Polackwich and Jonathan Richards was the negligence of Florida Power & Light Company, and that Boca Grande Club, Inc. was not guilty of any negligence that was the legal cause of the injuries to Robert J. Polackwich and Jonathan Richards, nor was any unseaworthy condition of the vessel in any way the cause of the injuries to Robert J. Polackwich and Jonathan Richards.

/s/ _____
David F. Pope
Macfarlane, Ferguson,
Allison & Kelly
P.O. Box 1531
Tampa, Florida 33601
Telephone: 813/223-2411

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL,
HULL NO. SUR 06214M82E

ANSWER AND AFFIRMATIVE DEFENSES TO CLAIM OF THE O'DAY CORPORATION

Boca Grande Club, Inc., Petitioner/Plaintiff, files this its Answer and Affirmative Defenses to the Claim of The O'Day Corporation.

ANSWER

1. The allegations of paragraph 1 of the Claim are admitted.

2. The allegations of paragraph 2 of the Claim are admitted.

3. The allegations of paragraph 3 of the Claim are admitted.

4. The allegations of paragraph 4 of the Claim are admitted.

5. The allegations of paragraph 5 of the Claim are admitted.

6. The allegations of paragraph 6 of the Claim are admitted.

7. The allegations of paragraph 7 of the Claim are admitted.

8. To the extent that paragraph 8 of the Claim alleges factual matters requiring a response from Boca Grande Club, Inc., the same are admitted.

9. To the extent that paragraph 9 of the Claim alleges factual matters requiring a response from Boca Grande Club, Inc., the same are admitted.

10. The allegations of paragraph 10 of the Claim are denied.

11. The allegations of paragraph 11 of the Claim are denied.

12. Boca Grande Club, Inc. does not possess sufficient information to admit or deny the allegations of paragraph 12 of the Claim, and the same are therefore denied.

WHEREFORE, having fully answered, Boca Grande Club, Inc. prays that the Claim of The O'Day Corporation be dismissed, and that Petitioner/Plaintiff recover its costs.

FIRST AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that the Claim of The O'Day Corporation for indemnity/contribution fails to state a claim upon which relief can be granted against Petitioner/Plaintiff because no contract providing for indemnity exists between the parties, and The O'Day Corporation was actively negligent with respect to the casualties at issue.

SECOND AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies the allegations of unseaworthiness of the vessel, and further denies that it was negligent in any way that was a legal cause of the injuries to Robert J. Polackwich and Jonathan Richards.

THIRD AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that at the time and place of the casualty, the sole legal cause of the injuries to Robert J. Polackwich and Jonathan Richards was the negligence of The O'Day Corporation, and the Boca Grande Club, Inc. was not guilty of any negligence that was the legal cause of the injuries to Robert J. Polackwich and Jonathan Richards, nor was any unseaworthy condition of the vessel in any way the cause of the injuries to Robert J. Polackwich and Jonathan Richards.

FOURTH AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies that The O'Day Corporation is entitled to attorney's fees as demanded in the Claim, as no factual or legal basis for a claim of indemnity and/or contribution exists.

/s/ _____
David F. Pope
MACFARLANE, FERGUSON,
ALLISON & KELLY
P.O. Box 1531
Tampa, Florida 33601
Telephone: 813/223-2411

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO: 88-1636-CIV-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 161 PRINDLE
CATAMARAN SAILING VESSEL, HULL
NO. SUR06214M82E

ANSWER, AFFIRMATIVE DEFENSES AND CLAIM OF JONATHAN RICHARDS, DECEASED, STEPHANIE POLACKWICH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JONATHAN RICHARDS, DECEASED, ROBERT J. POLACKWICH, DECEASED, ALAN S. POLACKWICH, SR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT POLACKWICH, DECEASED ALPHONSUS J. POLACKWICH, ELEANOR A. POLACKWICH AND THE LEGAL GUARDIAN OF ROBERT NATHAN POLACKWICH

COME NOW the Defendants/Claimants, JONATHAN RICHARDS, Deceased, STEPHANIE POLACKWICH, Individually and as Personal Representative of the Estate of JONATHAN RICHARDS, Deceased, ROBERT J. POLACKWICH, Deceased, ALAN S. POLACKWICH, SR., as Personal Representative of the Estate of ROBERT J. POLACKWICH, Deceased, ALPHONSUS J. POLACKWICH, ELEANOR A. POLACKWICH, and the legal guardian of ROBERT NATHAN POLACKWICH, and answer of BOCA GRANDE CLUB, INC.'s

Claim for Exoneration from or Limitation of Liability and make claim against BOCA GRANDE CLUB, INC. as follows:

ANSWER

1. Denied.
2. Without knowledge.
3. Without knowledge.
4. Denied.
5. Without knowledge.
6. Denied.
7. Denied.
8. Denied.
9. Denied.
10. Admitted.
11. Denied.
12. Without knowledge.
13. Denied.
14. Without knowledge.
15. Without knowledge.
16. Denied.

AFFIRMATIVE DEFENSES

Defendants/Claimants further raise the following Affirmative Defenses to the Complaint for Exoneration from or Limitation of Liability:

17. Plaintiff has failed to establish the statutory condition precedent for filing a Complaint in accordance with the Federal Rules of Civil Procedure and Supplemental Rule F of the Supplemental Rules for certain Admiralty and Maritime Claims in that Plaintiff cannot show receipt of a written claim submitted by these Defendants that sufficiently put Plaintiff on notice pursuant to the procedural requirements of Rule F, Subsection 1 of the Supplemental Rules for certain Admiralty and Maritime claims.

18. The accident involving the 16 foot Prindle Catamaran, rented by Defendant ROBERT J. POLACKWICH for the use and enjoyment of himself and JONATHAN RICHARDS was substantially caused by direct and active negligence on the part of Plaintiff BOCA GRANDE CLUB, INC. and its agents., servants, or employees.

19. There is direct privity and/or knowledge of Plaintiff BOCA GRANDE, INC. and its agents, servants, or employees in that Plaintiff sufficiently participated in the negligence which ultimately caused the accident at issue, thus, rendering the Plaintiff unable to seek the limitation of liability offered to owners of vessels under 46 U.S.C. 183.

20. The 16 foot Prindle Catamaran, Hull No. SUR06214M82E is not a defined "vessel" pursuant to 46 U.S.C. 181 thereby precluding BOCA GRANDE CLUB, INC. from enjoying the benefits of limitation of liability which exists solely by statute pursuant to 46 U.S.C. 181.

CLAIM

1. JONATHAN RICHARDS, Deceased, was the natural son

and dependent of STEPHANIE POLACKWICH.

2. STEPHANIE POLACKWICH is the natural mother and guardian of JONATHAN RICHARDS, Deceased; the natural mother and guardian of ROBERT J. POLACKWICH; and was wife of DR. ROBERT J. POLACKWICH, Deceased.

3. ALAN S. POLACKWICH, SR., is the duly appointed Personal Representative of the Estate of DR. ROBERT J. POLACKWICH, Deceased.

4. ALPHONSUS J. POLACKWICH and ELEANOR A. POLACKWICH are the natural mother and father of DR. ROBERT J. POLACKWICH, Deceased.

5. At all times material hereto the Plaintiff/ Defendant, BOCA GRANDE CLUB, INC., was a Florida corporation, organized and existing under the laws of the State of Florida, maintaining its business in Boca Grande, Florida and was engaged in the business of renting or otherwise permitting its members to use a 16 foot Prindle Catamaran sailboat in the navigable waters of the Gulf of Mexico and Gasparilla Pass in about the BOCA GRANDE CLUB.

6. On April 23, 1988 the mast of the 16 foot Prindle Catamaran sailboat which POLACKWICH and RICHARDS had rented came into contact with high voltage electrical transmission lines which hung perilously close to the waters of Gasparilla Pass, which contact caused the deaths of POLACKWICH and RICHARDS.

7. At all times material hereto the Claimant/ Defendant, BOCA GRANDE CLUB, INC. owed to POLACKWICH and RICHARDS a duty to use reasonable care in the maintenance and rental of the 16 foot Prindle Catamaran sailboat.

8. BOCA GRANDE CLUB failed to use reasonable care in the maintenance and rental of the 16 foot Prindle Catamaran sailboat and in the following respects:

a. The 16 foot Prindle Catamaran which was rented to POLACKWICH and RICHARDS was unseaworthy.

b. BOCA GRANDE CLUB failed to instruct POLACKWICH and RICHARDS about latent dangers which BOCA GRANDE CLUB, INC. or its agents or employees had superior knowledge.

c. BOCA GRANDE CLUB, INC. failed to maintain the 16 foot Prindle Catamaran in a reasonably safe condition such that all parts were in working order and all instructions or warnings were preserved.

9. As a direct and proximate result of the BOCA GRANDE CLUB, INC.'S failure to use reasonable care POLACKWICH and RICHARDS were electrocuted to death.

Accordingly, JONATHAN RICHARDS, Deceased, STEPHANIE POLACKWICH, Individually and as Personal Representative of the Estate of JONATHAN RICHARDS, Deceased, DR. ROBERT J. POLACKWICH, Deceased, ALAN S. POLACKWICH, SR., as Personal Representative of the Estate of DR. ROBERT J. POLACKWICH, Deceased, ALPHONSUS J. POLACKWICH, ELEANOR A. POLACKWICH, and the legal guardian of ROBERT NATHAN POLACKWICH file their claim against the BOCA GRANDE CLUB, INC. for such fees, costs, interest and damage to which they are entitled within the jurisdiction of this Court.

(Certificate of Service omitted in printing)

/s/ _____

Earl L. Denney, Jr.
Florida Bar No. 106834
Montgomery, Searcy & Denney, P.A.
P.O. Drawer 3626
West Palm Beach, Fl. 33402
(407) 686-6300

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL HULL
NO. SUR06214M82E

ANSWER AND AFFIRMATIVE DEFENSES TO CLAIM OF JONATHAN RICHARDS, DECEASED, STEPHANIE POLACKWICH, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JONATHAN RICHARDS, DECEASED, ROBERT J. POLACKWICH, DECEASED, ALAN S. POLACKWICH SR., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. POLACKWICH, DECEASED, ALPHONSUS J. POLACKWICH, ELEANOR A. POLACKWICH AND THE LEGAL GUARDIAN OF ROBERT NATHAN POLACKWICH

Boca Grande Club, Inc., Petitioner/Plaintiff, files this its answer and affirmative defenses to the claim of Jonathan Richards, deceased, Stephanie Polackwich, individually and as personal representative of the Estate of Jonathan Richards, deceased, Robert J. Polackwich, deceased, Alan S. Polackwich, Sr., as personal representative of the Estate of Robert J. Polackwich, deceased, Alphonsus J. Polackwich, Eleanor A. Polackwich and the legal guardian of Robert Nathan Polackwich.

ANSWER

1. Boca Grande Club, Inc. does not possess sufficient information to admit or deny the allegations of Paragraph 1 of the Claim, and the same are therefore denied.

2. Boca Grande Club, Inc. does not possess sufficient information to admit or deny the allegations of Paragraph 2 of the Claim, and the same are therefore denied.

3. Boca Grande Club, Inc. does not possess sufficient information to admit or deny the allegations of Paragraph 3 of the Claim, and the same are therefore denied.

4. Boca Grande Club, Inc. does not possess sufficient information to admit or deny the allegations of Paragraph 4 of the Claim, and the same are therefore denied.

5. Boca Grande Club, Inc. admits that at all times material hereto, it was a Florida corporation, organized and existing under the laws of the State of Florida, maintaining its place of business in Boca Grande, Florida, and was engaged in the business of renting to its members 16' Prindle Catamaran Sailing Vessels. The remaining allegations of Paragraph 5 of the Claim are denied.

6. Boca Grande Club, Inc. admits that on April 23, 1988, the mast of the 16' Prindle Catamaran Sailing Vessel which Polackwich had rented came into contact with high voltage electric power/transmission lines in the vicinity of certain navigable waters commonly known as Gasparilla Pass, which contact caused the deaths of Polackwich and Richards. The remaining allegations of Paragraph 6 of the Claim are denied.

7. To the extent that Paragraph 7 of the Claim alleges factual matters requiring a response from Boca Grande Club, Inc., the same are denied.

8. The allegations of Paragraph 8 of the Claim, and

SubParagraphs a, b, and c, thereof are denied.

9. The allegations of Paragraph 9 of the Claim are denied.

WHEREFORE, having fully answered, Boca Grande Club, Inc. prays that the Claim of Jonathan Richards, deceased, Stephanie Polackwich, individually and as personal representative of the Estate of Jonathan Richards, deceased, Robert J. Polackwich, deceased, Alan S. Polackwich, Sr., as personal representative of the Estate of Robert J. Polackwich, deceased, Alphonsus J. Polackwich, Eleanor A. Polackwich and the legal guardian of Robert Nathan Polackwich, be dismissed, and that Petitioner/Plaintiff recover its costs.

FIRST AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that any injury, losses or damages sustained or suffered by Robert J. Polackwich and/or Jonathan Richards at the times and places and on the occasions mentioned in the Claim were proximately caused, in whole or in part, or were contributed to, in whole or in part, by the neglect, fault, or want of care of Robert J. Polackwich and/or Jonathan Richards, and not by any neglect, fault, or want of care on the part of Boca Grande Club, Inc., or by any unseaworthiness of the 16' Prindle Catamaran Sailing Vessel.

SECOND AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies the allegations that it failed to exercise reasonable care in the maintenance and rental of the 16' Prindle Catamaran Sailing Vessel, and further denies that it was negligent in any way that was the legal cause of the injuries to Robert J. Polackwich and Jonathan Richards.

THIRD AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies that either Robert J. Polackwich or Jonathan Richards were the beneficiaries of any warranty of seaworthiness concerning the 16' Prindle Catamaran Sailing Vessel.

FOURTH AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that the usage of the 16' Prindle Catamaran Sailing Vessel by Robert J. Polackwich and Jonathan Richards was subject to the terms and conditions of a rental agreement, and Boca Grande Club, Inc. incorporates into its Answer and Affirmative Defenses all of the terms and conditions of said rental agreement. A true and correct copy of said rental agreement is attached hereto as an exhibit.

FIFTH AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. specifically denies the allegations of unseaworthiness of the 16' Prindle Catamaran Sailing Vessel, and further denies that it was negligent in any way that was a legal cause of the injuries to Robert J. Polackwich and Jonathan Richards.

SIXTH AFFIRMATIVE DEFENSE

Boca Grande Club, Inc. alleges that at the time and place of the casualty, the sole legal cause of the injuries to Robert J. Polackwich and Jonathan Richards was the negligence of persons/parties other than the Boca Grande Club, Inc., and that Boca Grande Club, Inc. was not guilty of any negligence that was the legal cause of the injuries to Robert J. Polackwich and Jonathan Richards, nor was any unseaworthy condition of the 16' Prindle Catamaran Sailing Vessel in any way the cause of the injuries to Robert J. Polackwich and Jonathan Richards.

/s/ _____

David F. Pope
D. James Kadyk
MACFARLANE, FERGUSON,
ALLISON & KELLY
P. 0. Box 1531 - Tampa, Florida 33601
Telephone: 813/223-2411
Attorneys for Plaintiff

(Certificate of service omitted in printing)

BOCA GRANDE CLUB

Date:_____Boat: _____

Name: _____Rate 1st Hr.___ _____Addl. Hrs. ____

Home Address: _____Time In: _____

_____Time Out:_____

Local Address:_____Total Time: _____

_____Rental Charge: $_____

Car: _____Tag #:_____Sales Tax: $_____

Deposit: $ _____Total Charge: $_____

1. Wear life vest at all times, especially when winds are above 8 miles per hour.

2. Stay at least 25 yards from all obstructions.

3. Move to nearest shore in event of a thunderstorm, point boat to wind, loosen sails and take cover.

4. Watch out for other boats, especially power boats.

5. In case you overturn, point top of mast into the wind, pull down on highest hull and boat will right itself.

REMEMBER — STAY WITH YOUR BOAT — IT WON'T SINK!

I HAVE READ AND UNDERSTOOD THE ABOVE CAUTIONS. I AGREE TO RETURN TO THE OWNER ALL RENTED EQUIPMENT FREE OF DAMAGE AND LOSS. FURTHER, I AGREE TO ASSUME FULL RESPONSIBILITY FOR ALL DAMAGES TO PROPERTY, THEREBY RELEASING RENTER AND OWNER FROM ANY AND ALL LIABILITIES THAT I MAY CAUSE WHILE EQUIPMENT IS IN MY POSSESSION AND UNDER MY CARE. I AGREE TO BE BOUND TO ALL THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT.

SIGNED: s/Polackwich DATE: 4/23/88

Exhibit to Answer and Affirmative Defenses.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
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OF

BOCA GRANDE CLUB, INC. FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNER OF A 16' PRINDLE CATAMARAN SAILING VESSEL, HULL NO. SUR06214M82E

STIPULATION AND JOINT MOTION FOR DISMISSAL

Boca Grande Club, Inc., Plaintiff, and
Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of the estate of Eleanor A. Polackwich, Deceased,

hereinafter referred to as Stipulating Claimants, do hereby stipulate and agree that the claims of each of the Stipulating Claimants against Boca Grande Club, Inc. filed in this proceeding have been amicably, fairly and reasonably resolved and settled provided the conditions stated below are met and do hereby jointly move the Court for entry of an order dismissing, with prejudice, the claims of each of the above Stipulating Claimants against the Plaintiff.

The settlement between Plaintiff and Stipulating Claimants is conditioned upon the stay of this limitation action as to the remaining claims until the actions in state court have been completed. Accordingly, Plaintiff and Stipulating Claimants do hereby jointly move the Court for an Order staying the further prosecution of this action until the presently pending actions in state court have been completed. Plaintiff and the Stipulating Claimants do further move that the Court provide in its Order of Dismissal that the case will be so stayed, except for motions for summary judgment to be hereafter filed by Plaintiff as to the remaining claims of Florida Power & Light Company and the 0'Day Corporation for indemnity and contribution.

The settlement between Plaintiff and the aforesaid Stipulating Claimants is also conditioned upon the Court's providing in its order of dismissal that the injunction heretofore entered by the Court in this proceeding be lifted as to the Stipulating Claimants. The order of dismissal should also specifically provide, that the injunction shall remain in full force and effect only as to any claims against Boca Grande Club, Inc.

The parties hereto further move the Court to provide in its order of dismissal that the Plaintiff and each of the Stipulating Claimants shall bear their own respective costs.

Stipulated and agreed on this 10 day of December, 1990.

MACFARLANE, FERGUSON,
ALLISON & KELLY
By: /s/ _____
Jack C. Rinard #095376
D. James Kadyk #238325
P.O. Box 1531
Tampa, FL 33601
Tel: 813/223-2411
Attorneys for Boca Grande Club, Inc.

SEARCY, DENNEY, SCAROLA,
BARNHART & SHIPLEY
By:/s/_____
John A. Shipley
P.O. Drawer 3626
West Palm Beach
Florida 33401-3626
Tel: 407/686-6300
Attorneys for Settling Claimants

(Certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

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OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL, HULL
NO. SUR06214M82E

MEMORANDUM OF LAW IN SUPPORT OF JOINT MOTIONS

Boca Grande Club, Inc., Plaintiff, files this memorandum of law in support of the joint motions set out in the Stipulation and Joint Motion for Dismissal and Stay filed concurrently herewith by Plaintiff and those parties identified as Stipulating Claimants in said Stipulation.

I. Stay Of Limitation Action

Boca Grande Club and the Stipulating Claimants have amicably resolved all claims and issues outstanding between them and seek to have all claims of the Stipulating Claimants in this action and in the pending state court action dismissed with prejudice as to Boca Grande Club. The settlement between Boca Grande Club and the Stipulating Claimants is conditioned upon obtaining a stay of this limitation proceeding until the state court action is concluded or the termination of this limitation action by summary judgment as to all remaining claimants in this proceeding.

Upon consummation of the settlement between Boca Grande Club and the Stipulating Claimants, the only claims left in this limitation action will be the claims of Florida Power & Light Company and The O'Day Corporation. Each of those companies seek indemnity or contribution from Boca Grande Club in the event that either of the companies is found to be liable to the Stipulating Claimants in the state court action.

Boca Grande Club intends to promptly file a motion for summary judgment directed to the indemnity and contribution claims of Florida Power & Light Company and The O'Day Corporation which will demonstrate to the Court that neither of those companies have any basis for claiming indemnity from Boca Grande Club and also showing that the law in the Eleventh Circuit is clearly to the effect that the settlement between Boca Grande Club and the Stipulating Claimants will serve to legally cut off any contribution rights that Florida Power & Light Company and The O'Day Corporation may otherwise have had. However, the immediate chore is to consummate the settlement, get the Stipulating Claimants out of the limitation action and the state proceeding back in gear.

As the Court will appreciate, once the Stipulating Claimants are out of this limitation action, all that is left are the indemnity and contribution claims. Even assuming for the purpose of the motion to stay that there may be viable claims for indemnity or contribution at some time in the future it is obvious that such claims can not be quantified until the state proceeding is terminated. There is therefore nothing for this Court to do in this limitation action after the settlement with the Stipulating Claimants is consummated until the state proceeding is completed. That is, nothing except to address the motion for summary judgment mentioned above when it is filed by Boca Grande Club.

II. Lift Injunction As To Stipulating Claimants And Permit Them To Proceed In State Court.

The settlement between Boca Grande Club and the stipulating

Claimants is also conditioned upon the Court lifting the injunction in this limitation proceeding as to the Stipulating Claimants and permitting them to go forward with their state court actions against entities other than Boca Grande Club. It is Submitted that the lifting of the injunction follows as a matter of course once the Stipulating Claimants are dismissed from the limitation case. All of the claims between the Stipulating Claimants and Boca Grande Club will have been resolved and terminated and, accordingly, there will be no need to enjoin actions by the Stipulating Claimants against Boca Grande Club. Additionally all claims made by the Stipulating Claimants in the pending state proceeding will also be dismissed as a part of the settlement.

The injunction must remain in effect as to all parties other than the Stipulating Claimants. Furthermore, the injunction must specifically remain in effect as to the third party complaint which Florida Power & Light Company filed against Boca Grande Club in the state action.

III. The Injunction Protects Only Boca Grande Club.

The injunction entered by the Court (doc 55) protects only Boca Grande Club. The injunction prohibits actions against Boca Grande Club in any forum other than in this limitation proceeding. Included within the injunction is the third party complaint filed by Florida Power & Light Company against Boca Grande Club in the state court action. The third party complaint seeks indemnity or contribution. Florida Power & Light Company has also filed a claim for indemnity or contribution in this limitation action in the event it is held liable to the Stipulating Claimants in the pending state proceeding.

The injunction does not prohibit suits by any other parties for damages alleged to arise out of the casualty from which this limitation action arises. That is, the injunction does not in any way prohibit any of the Stipulating Claimants from suing, for example, Florida Power & Light Company in the state proceeding.

Unfortunately, confusion has been injected into this case, and certainly into the state proceeding, by claimants in the limitation proceeding who are also defendants in the state case. Both Florida Power & Light company and The O'Day Corporation have asserted that the injunction entered in favor of Boca Grande Club prohibits the prosecution of the state actions against them. (See the memorandums filed in opposition to the Stipulating Claimants motion to clarify the injunction, doc. 90 and 91.) Indeed, Florida Power & Light Company has filed a motion in the state action informing the state court that it is enjoined from proceeding with the state proceedings. (See the motion filed by Florida Power & Light company seeking an order to remove the state case from the trial calendar; a copy is attached as Exhibit A.) The injunction does not protect those who have filed claims against Boca Grande Club in this limitation proceeding nor is it any impediment to parties who have filed claims in a limitation proceeding from litigating amongst themselves outside of the limitation action. In *Matter of Brent Towing Co., Inc.*, 414 F.Supp. 131 (N.D. Fla. 1975).

To clear up any existing confusion, particularly for the benefit of the state court, Boca Grande Club prays that the Court will specifically note in its order lifting the injunction as to the Stipulating Claimants exactly what claims and which parties continue to be subject to the injunction in this limitation action.

CONCLUSION

In view of the joint motion and the foregoing points, Boca Grande Club, Inc. prays that the Court will take the following action:

1. Grant the joint motion of dismissal and dismiss all claims of the Stipulating Claimants with prejudice.

2. Grant the joint motion for a stay of this action and provide in said order that Boca Grande Club, Inc. has leave to file motions for summary judgment as to the remaining claims for indemnity and contribution.

3. Provide in the order of dismissal that the injunction entered in this limitation proceeding shall be lifted as to the Stipulating Claimants but shall remain in full force and effect as to all remaining claims in the limitation proceeding and specifically provide in said order that the injunction remains in effect as to the claims by Florida Power & Light Company and The O'Day Corporation for indemnity or contribution.

4. Provide in the order of dismissal that Boca Grande Club, Inc. and the Stipulating Claimants will bear their own respective costs of this action.

Request For Hearing

Boca Grande Club, Inc. and the Stipulating Claimants request a very brief hearing before the Court with respect to the Stipulation and Joint Motions and believe such a hearing would serve to expedite consummation of the settlement.

Respectfully submitted,

MACFARLANE, FERGUSON,
ALLISON & KELLY
/s/ _____
Jack C. Rinard #095376
David F. Pope #1164452
P.O. Box 1531
Tampa, FL 33601
Tel: 813/223-2411
Attorneys for Boca Grande Club, Inc.

(Exhibit A and certificate of service omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO: 88-1636-CIV-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL, HULL
NO. SUR06214M82E

FLORIDA POWER AND LIGHT COMPANY'S MEMORANDUM IN RESPONSE TO STIPULATION AND JOINT MOTION FOR DISMISSAL

Pursuant to Local Rule 3.01, Middle District Florida Rules, Florida Power and Light Company hereby files its memorandum in response to the Stipulation and Joint motion for Dismissal previously filed by counsel for the Boca Grande Club and counsel for the Estates of Jonathan Richards and Robert Polackwich.

PROCEDURAL BACKGROUND OF THIS MOTION

This action was instituted by the filing of a petition for limitation of or exoneration from liability by the Boca Grande Club, Inc. The action arises out of a maritime accident which occurred on April 23, 1988, when a sailboat occupied by Robert J. Polackwich and Jonathan Richards came into contact with overhead electrical power lines near Boca Grande, Florida. The sailboat involved in the incident was owned and maintained by the Boca Grande Club, Inc. and was manufactured by the O'Day Corporation or its prede-

cessor-in-interest. The overhead electrical power lines in question were owned and maintained by Florida Power and Light Company.

The representatives of the Estates of Polackwich and Richards instituted wrongful death actions in Florida state circuit court. Those state court actions initially named Florida Power and Light Company and the O'Day Corporation as defendants. Certain discovery was previously completed in the state court actions. Shortly thereafter, the Boca Grande Club, Inc. instituted this limitation of liability action. Claims were filed against the Boca Grande Club, Inc. by numerous claimants, including the Estate of Robert Polackwich, the Estate of Jonathan Richards, the O'Day Corporation and Florida Power and Light Company. Ultimately, this Court issued its injunction staying further prosecution of the state court action.

This matter is now before the Court for consideration of a joint motion for dismissal filed by counsel for Boca Grande Club and the Estates.

ANY COURT ORDER RESULTING FROM THE JOINT MOTION SHOULD NOT OPERATE TO APPROVE THE SETTLEMENT AS ONE ENTERED INTO IN GOOD FAITH.

As of the date of this filing, Florida Power and Light Company has not been provided with any of the settlement documents which set forth the precise terms of the agreement between the Estates and the Boca Grande Club. Accordingly, Florida Power and Light Company is unable to determine whether the settlement is one which can properly be characterized as a "good faith" settlement. However, informally obtained information regarding the settlement suggests that the settlement funds paid by the Boca Grande Club do not accurately reflect either Boca Grande's potential liability, its available insurance proceeds or the Estates evaluation of the value of the case.

Under such circumstances, Florida Power and Light Company

cannot agree to dismissal of any claims upon any terms which affect the claims filed by Florida Power and Light Company. Specifically, any Court Order which purports to pass upon the settlement should not operate to foreclose Florida Power and Light Company from later challenging the settlement, particularly if the alleged "good faith" nature of the settlement is used as a premise for Boca Grande Club, Inc.'s subsequent motion for summary judgment on Florida Power and Light Company's claims for contribution and/or indemnity. The inquiry into whether a settlement is one entered into in good faith involves a multi-pronged analysis which would be impossible to undertake on the information currently before the Court. Therefore, Florida Power and Light Company opposes entry of an Order of the Court "approving" the alleged settlement and requests that any Order entered by the Court regarding the settlement contain language which expressly reserves for later decision any determination regarding the good faith nature or reasonableness of the settlement. Finally, numerous discovery matters remain unresolved and pending before this Court and should be resolved by the Court prior to any dismissal so that the parties need not be further delayed by having to re-visit such matters in state court.

/s/ _____
C. Steven Verrid
Florida Bar Number: 207549
Yerrid, Knopik & Valenzuela, P.A.
101 East Kennedy Boulevard
Suite 2160
Tampa, Florida 33602
(813) 222-8222
Attorneys for Florida Power & Light

(Certificate of service omitted in printing.)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-CIV-T-17A

IN THE MATTER OF THE COMPLAINT
OF
BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING
VESSEL, HULL NO. SUR06214M82E

ORDER

THIS CAUSE is before the Court upon the Stipulation and Joint Motion for Dismissal filed by Boca Grande Club, Inc., Plaintiff, and the following Stipulating Claimants in this case:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr., as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich, as personal representative of the estate of Jonathan Richards, Deceased

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich, as personal representative of the estate of Eleanor A. Polackwich, Deceased.

The Stipulation and Joint Motion for Dismissal was considered by the United States Magistrate Judge, pursuant to a specific order of referral, and the Magistrate Judge has filed his report recommending that all claims filed in this case by the Stipulating Claimants against the Plaintiff be dismissed with prejudice, subject to conditions that the Magistrate Judge recommends the Court approve.

Upon consideration of the report and recommendation of the Magistrate Judge and upon this Court's independent examination of the file, the Magistrate Judge's report and recommendation is adopted and confirmed and made a part hereof, and it is

ORDERED that:

1. The Joint Motion for Dismissal is GRANTED, and all claims of the Stipulating Claimants against the Plaintiff only are hereby dismissed with prejudice.

2. Further prosecution of this limitation action is hereby STAYED until the state court lawsuits have been terminated. The only exception to this stay is that Plaintiff may, within forty-five (45) days from the date of this Order, file motions for summary judgment as to the claims of Florida Power & Light Company and The O'Day Corporation which seek indemnity and contribution. Florida Power & Light Corporation and The O'Day Corporation will respond to any such motions filed by Plaintiff in accordance with the Local Rules of this Court.

3. The "Order on Motion for Injunction and Injunction" ("Injunction Order," doc. 55) entered by the United States Magistrate Judge on February 23, 1990 is hereby LIFTED as to each of the Stipulating Claimants and each Stipulating Claimant is free to pursue whatever actions he or she may have against parties other than Boca Grande Club, Inc. in other forums, including the action presently pending in the Fifteenth Judicial Circuit in Palm Beach County, Florida, Case No. CL 89-9670 AH. The Injunction Order remains in full force and effect only with respect to other

parties' or potential parties' actions, if any, against Boca Grande Club, Inc., as owner of 16' Prindle Catamaran Sailing Vessel and particularly with respect to the claims of parties in this action against Boca Grande Club, Inc. that have not been settled. The injunction remains specifically in effect as to claims by Florida Power & Light Company and The O'Day Corporation for indemnity and contribution. The injunction does not protect Florida Power & Light Company, The O'Day Corporation, or any party other than Boca Grande Club, Inc.

4. All pending discovery motions are hereby DENIED.

5. The entry of this Order does not make any determination as to the good faith of the settlement between the Plaintiff and the Stipulating Claimants.

6. Boca Grande Club, Inc. and each of the Stipulating Claimant shall bear their own respective costs.

DONE and ORDERED in Chambers at Tampa, Florida, this 13th day of March, 1991.

/s/ _____
UNITED STATES DISTRICT JUDGE
ELIZABETH A. KOVACHEVICH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

MOTION FOR SUMMARY JUDGMENT AS TO CLAIMS OF FLORIDA POWER & LIGHT COMPANY AND THE O'DAY CORPORATION

Boca Grande Club, Inc., Plaintiff, moves the court for entry of an order granting summary judgment as to the claims of Florida Power & Light Company (FPL) and The O'Day Corporation (O'Day) for indemnity or contribution. Boca Grande Club would show to the Court that there do not exist in this case any disputed facts with respect to the claims of FPL and O'Day for indemnity or contribution and, accordingly, summary judgment is appropriate as a matter of law. Rule 56, *F. R. Civ. P.*

Memorandum in Support of Motion

This limitation action was started by Boca Grande Club as a result of the deaths of Dr. Polackwich and Jonathan Richards when the mast of the sailboat they were operating in the navigable waters of Gasparilla Pass contacted a high voltage electric transmission line. The claims of the estates of Dr. Polackwich and Jonathan

Richards as well as the claims of others (heretofore and herein called collectively "Stipulating Claimants") filing claims in the limitation action as a result of the deaths have been settled by Boca Grande Club. This Court, in its order of March 13, 1991, dismissed with prejudice all the claims, with two exceptions, arising out of the deaths. The two remaining claims are those of FPL and O'Day for "indemnity and contribution." (See doc. 10 and 11). In its order of March 13th the Court stayed further proceedings in this limitation action until resolution of state court actions brought by the Stipulating Claimants in Palm Beach County. The Court permitted Boca Grande Club to file a motion for summary judgment as to the claims of FPL and O'Day for indemnity and contribution.

Boca Grande Club will demonstrate in this memorandum that neither FPL nor O'Day ever had actions for indemnity. Boca Grande Club will also demonstrate that the settlement it made with the Stipulating Claimants effectively bars any action that FPL and O'Day may have had for contribution. Because FPL and O'Day have no claims upon which this Court may grant relief, summary judgment is particularly appropriate. Rule 12, *F. R. Civ. P.; Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

A. The Indemnity Claims.

Both FPL and O'Day have asserted claims for indemnity. It is fundamental that indemnity arises only out of a contract which provides for one to indemnify another or out of a relationship whereby one party, who is without fault, may nevertheless become vicariously liable for the negligence of another. An example is the relationship of master and servant. See generally, Prosser & Keeton, The Law of Torts, (5th ed 1984), §51. There is no contract between Boca Grande Club and FPL or O'Day. Accordingly, contract can furnish no basis for the indemnity claims of FPL and O'Day.

Similarly, there is no relationship between Boca Grande Club

on the one hand and either FPL or O'Day on the other out of which FPL or O'Day would be held vicariously liable for any wrongdoing of Boca Grande Club. No such relationship was alleged and none exists. If FPL or O'Day are ultimately found to be liable to the Stipulating Claimants it will be because of the act or omission of FPL or O'Day Corporation and not because of an act or omission of Boca Grande Club.

At one time a third theory of indemnity, known as the concept of active-passive negligence, prevailed in maritime cases. That theory permitted a wrongdoer who was merely passively negligent to obtain indemnity from an actively negligent party. The active-passive negligence theory of indemnity no longer prevails. It was rejected by the United States Court of Appeals for the Fifth Circuit in *Loose v. Offshore Navigation, Inc.*, 670 F. 2d 493, 500-502 (5th Cir 1982). Rejection of the doctrine was approved by the United States Court of Appeals for the Eleventh Circuit in *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540, 1556-1557 (11th Cir 1987). Even were the active-passive theory still viable it would not support indemnity in this case because the liability of FPL and O'Day will depend on the acts of each and not on the acts of some other party.

Neither FPL nor O'Day have alleged any facts which would support indemnity and there is in fact no basis for indemnity in this case. Accordingly, the Court should forthwith grant summary judgment in favor of Boca Grande Club as to the indemnity claims of FPL and O'Day.

B. The Contribution Claims.

FPL and O'Day also assert claims for contribution against Boca Grande Club. Each has alleged that if it is found liable to the Stipulating Claimants then it is entitled to contribution from Boca Grande Club. It is the position of Boca Grande Club that pursuant to the law of the Eleventh Circuit the settlement it made with the Stipulating Claimants effectively bars claims for contribution by

non-settling tortfeasors such as FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540 (11th Cir 1987); *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller*, 1990 A.M.C. 2247 (M.D. Fla. 1990).

The contribution claims of FPL and O'Day are maritime claims which are governed by maritime law. *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S. Ct. 2174, 40 L. Ed 2d 694 (1974); *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540, 1547 (11th Cir 1987); *Daughtry v. Diamond M Company*, 693 F. Supp 856 (C.D. Cal. 1988).

In *Self*, the Eleventh Circuit held:

> Under the principle announced in *Luke v. Signal Oil & Gas Co.*, 523 F. 2d 1190 (5th Cir 1975), contributions cannot be obtained by one tortfeasor who has settled with and been released by the claimant. 832 F. 2d at 1547.

Following the Eleventh Circuit's decision in *Self*, that case came back to the district court to resolve the claim of Great Lakes Dredge & Dock Company for contribution from Chevron Shipping company. Chevron had many years previously settled with the plaintiffs and obtained a release. Great Lakes nevertheless claimed contribution from Chevron because Great Lakes paid a greater share to the injured parties than its proportionate share of fault. Chevron moved for summary judgment on Great Lakes contribution claim and argued that *Self* held that no actions for contribution could be brought against a settling tortfeasor. The Court agreed and granted Chevron's motion for summary judgment. *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller*, 1990 A.M.C 2247 (M.D. Fla. 1990).

In this case Boca Grande Club has settled with the Stipulating Claimants. A copy of the release given to Boca Grande Club is attached as Exhibit A. That settlement bars the claims of FPL and O'Day for contribution. Accordingly, the Court must forthwith

enter summary judgment in favor of Boca Grande Club as to the contribution claims of FPL and O'Day.

C. Good Faith Settlement.

FPL objected to the Joint Motion and Stipulation filed by Boca Grande Club and the stipulating Claimants which sought an order of dismissal of the claims of the Stipulating Claimants and the stay of further proceedings in the limitation action. The basis for FPL's objection to the settlement was stated by FPL as follows:

> ...Florida Power & Light Company cannot agree to dismissal of any claims upon any terms which effect the claims filed by Florida Power & Light Company. Specifically, any Court order which purports to pass upon the settlement should not operate to foreclose Florida Power & Light Company from later challenging the settlement, particularly if the alleged 'good faith' nature of the settlement is used as a promise for Boca Grande Club, Inc.'s subsequent motion for summary judgment on Florida Power & Light Company's claims for contribution and/or indemnity. (Florida Power & Light Company's Memorandum In Response To Stipulation And Joint Motion For Dismissal, p. 3).

FPL cited no authority for the proposition that a settlement must be demonstrated to be in good faith before it effectively bars claims for contribution. At the hearing before the magistrate FPL articulated the same point quoted above, again, without referring the magistrate to any authority to support the proposition. Given the position that FPL has taken it is assumed that FPL will oppose this motion for summary judgment as to the contribution claims upon the grounds that this Court has not determined that the settlement between Boca Grande Club and the Stipulating Claimants was made in "good faith."

The term "good faith" is susceptible of many meanings. FPL has yet to divulge precisely what it conceives is encompassed by

its use of the phrase. The settlement between Boca Grande Club and the Stipulating Claimants was made in "good faith" from the perspective of both Boca Grande Club and the Stipulating Claimants. The settlement was made in the open, without any collusive purpose or ulterior motive. From the perspective of Boca Grande Club, the club settled a case in which it did not deem itself to be responsible and in which it believed ultimately it would be found to be free of fault, in order to extricate itself from a time consuming and expensive lawsuit. From the perspective of the Stipulating Claimants, they received a sizable amount of money from a party that they had not sued in their state court actions, in order to remove themselves from a limitation proceeding that potentially restricted and seriously complicated the prosecution of their actions against the parties they considered to be primarily liable; i.e., the defendants in the state court actions. (Boca Grande Club was not initially sued in the state court actions by the Stipulating Claimants. Boca Grande Club was brought into those actions by the third party complaint of FPL asking for indemnity and contribution.)

In so far as concerns the effect of the settlement upon the remaining claims of FPL and O'Day for contribution, it is the position of Boca Grande Club that the settlement bars contribution. It is the position of Boca Grande Club that it is not necessary for Boca Grande Club to endeavor to unilaterally demonstrate that the settlement was in "good faith" in any sense, nor is it necessary that the district court hold a hearing or trial to determine whether or not the settlement was made in "good faith." The fact that there has been a settlement and release given to Boca Grande Club is sufficient to bar the contribution claims of FPL and O'Day. *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540 (11th Cir 1987).

Courts outside of the Eleventh Circuit have dealt with the concept of good faith in deciding what effect a settlement will have on contribution claims in maritime cases. The opinions in *Miller v. Christopher*, 887 F. 2d 902 (9th Cir 1989) and *Commercial Cleaning Corporation v. Allied Chemical Company*, 206 Cal App

3d 1066, 254 Cal Rptr 401, 1989 A.M.C. 769 (1988, 4th Dist.) provide useful background to the different theories as to the effect a settlement has on claims for contribution by non-settling parties. (Because the opinion in *Commercial Cleaning Corporation v. Allied Chemical Company* was withdrawn by the California Supreme Court that opinion cannot be considered as precedent. See *Great Lakes Dredge & Dock Company v. Tanker Robert Miller*, 1990 A.M.C. 2254, 2249, n 1 (M.D. Fla. 1990). Nevertheless, the opinion is most useful and is entitled, at least, to the consideration given to a relevant text or law review article.)

Both opinions discuss at length the three potential solutions to the problem presented in a situation where one of a number of defendants enters into a settlement with the plaintiff. The alternatives are set out in Restatement (Second) of Torts §886 A, comment m. The second alternative is that:

> (2) The money paid extinguishes both any claims on the part of the injured party and any claim for contribution by another tortfeasor who has paid more than his equitable share of the obligation and seeks contribution.

The courts in *Commercial Cleaning* and *Miller v. Christopher both* recognized that the Eleventh Circuit, in *Self v. Great Lakes Dredge & Dock Company, supra*, elected to follow the quoted alternative; namely, that settlement extinguishes rights to contribution by the remaining defendants. *Miller v. Christopher*, 887 F. 2d 902, 905-906 (9th Cir 1989); *Commercial Cleaning Corporation v. Allied Chemical Company*, 1989 A.M.C. 769, 778-789 (4th Dist 1988). The Restatement comment notes that the second alternative favors the settling tortfeasor and suggests that a requirement of good faith may be necessary, but then concludes:

> But once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, *the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated*. See 1989 A.M.C. at 775 (Emphasis added).

In other words, a requirement that there be a demonstration that a settlement comports with some preestablished criteria of "good faith" will effectively dilute the finality of settlement. If there can be no certainty and finality as a result of a settlement there can be no incentive to settle in the first place.

It is very clear that the Eleventh Circuit, in selecting the second alternative, was very conscious of the fact that a nonsettling tortfeasor could end up paying more or less than its judicially determined proportionate share of a loss. On this point the court held:

> We do not overlook the fact that in a case such as this, a joint tortfeasor may be left paying a higher or lower percentage of the damages than it caused. Nor do we overlook the rule that there may be joint contribution amongst tortfeasors in an admiralty case *and that in the absence of a settlement*, the amount of Contribution turns on the percentage of fault of each joint tortfeasor.
>
> * * *
>
> We acknowledge that the rule that we adopt today may cause disparity in the percentage of payment as between the settling and nonsettling tortfeasor in maritime personal injury actions. 832 F. 2d at 1547-1548 (Emphasis added).

Significantly, the Court in *Self* did not tack on to the rule that contributions cannot be obtained from settling tortfeasors a requirement that there must be a demonstration that the settlement was in "good faith." Implicit in the Eleventh Circuit's decision in *Self* is the rejection by that court of the concept that a settlement, to act as a bar against claims for contributions by non-settling tortfeasors, must reasonably represent the ultimate degree of proportionate fault of the settling tortfeasor. *Cf. Leger v. Drilling Well Control, Inc.*, 592 F. 2d 1246 (5th Cir 1979). *Leger* was rejected by the Eleventh Circuit. *Self*, 832 F. 2d at 1547-1548.

By contrast, the United States Court of Appeals for the Ninth Circuit in *Miller v. Christopher*, 887 F. 2d 902 (9th Cir 1989)

affirmed a determination of the district court that the settlement reached in that case was made in good faith and therefore barred claims for contribution from the settling tortfeasors. The Ninth Circuit approved the district court's use of California law to apply the standard for determining whether the settlement was in good faith, notwithstanding the fact that the court pointed out that in maritime cases state law is not controlling. 887 F. 2d at 905.

The difference between the rule developed in *Self* and the approach taken by the Ninth Circuit in *Christopher* is obvious. Under the *Self* rule a settlement, without more, bars contribution claims against the settling tortfeasor. Under the *Christopher* approach it is necessary for the district court to conduct an evidentiary hearing in an effort to approximate the value of the plaintiff's claim and to evaluate the relative degrees of fault among the defendants. After this expenditure of labor there may follow an appeal with a full review by the appellate court of the actions of the district judge. Clearly this is an impractical approach. Boca Grande Club submits that the *Christopher* approach is wasteful and unworkable. Obviously, no rational party would pay several hundred thousand dollars to settle his dispute with a plaintiff if the result was that he had to participate in a trial to ascertain whether the settlement met a "good faith" criteria followed by an appeal taken by a disgruntled non-settling tortfeasor trying to protect its right of contribution.

In *Great Lakes Dredge & Dock Company v. Tanker Robert Watt Miller*, 1990 A.M.C. 2247 (M.D. Fla. 1990), Great Lakes sought to avoid the effect of the settlement bar rule of *Self* by arguing that the court should determine relative degrees of fault between the various tortfeasors. The district court refused and noted:

> The matters in need of resolution in order to determine contribution are so voluminous that to resolve them, if they are resolvable at all, would involve the staging of the trials that the parties sought to avoid through settlement. Great Lakes labeled 'unworthy of consideration' Chevron's argu-

ment concerning this burden. The Court views the matter otherwise. Setting aside the destructive impact on future settlements that the precedent of such a trial would have, ... the Court is persuaded that Great Lakes' proposal would invest an enormous amount of judicial resources in an essentially futile enterprise. In addition to the criticism leveled previously herein, the Court observes that the persons with the greatest knowledge of the relevant issues are the claimants who have settled their claims, and those persons no longer are parties to these actions. Their absence from the proposed proceedings would reduce the reliability and accuracy of the determinations reached; their presence would be an unjustified burden. 1990 A.M.C. at 2253, n 4.

If a settlement between a plaintiff and one of several tortfeasors in a maritime personal injury case is subject to judicial inquiry to determine whether or not it is in "good faith" or reasonable in light of the ultimate value of the plaintiff's claims and the potential liability of the various defendants, which determination will obviously be subject to appeal, then there will be few if any settlements concluded. A settlement subject to "good faith" will not permit the settling party to close his file and know that his involvement in the controversy is at an end. That is true even if the district courts had the manpower and time to judicially oversee settlements and the appellate courts resources ample to review all such determinations of the trial courts. The rule developed by the Eleventh Circuit in *Self* is simple, reasonable and practical. It permits a settling tortfeasor to close his file knowing that all claims for contribution against him are barred; he is no longer involved in the controversy and need have no concerns about its ultimate outcome. That rule must be applied to the settlement between Boca Grande Club and the Stipulating Claimants and summary judgment must be awarded in favor of Boca Grande Club as to the claims for indemnity and contribution of FPL and O'Day.

D. The Settlement has Been Approved.

The settlement between Boca Grande Club and the Stipulating

Claimants has been approved by the principal claimants and the Circuit Court for Palm Beach County. Attached as Exhibit B is a copy Motion for Approval of Settlement filed (in the Circuit Court for Palm Beach County) by Stephanie J. Polackwich and Alan S. Polackwich, Sr., two of the Stipulating Claimants. These claimants point out to the court that the settlement is in the best interest of "all claimants and survivors." Attached to the motion are the affidavits of individual Stipulating Claimants in which they inform the Circuit Court that they confirm their agreement to the settlement and the manner in which they have agreed to distribute the settlement proceeds. Each asks the Circuit Court to approve the settlement.

Boca Grande Club has been informed that the Circuit Court has held a hearing on the motion asking for approval of the settlement and thereafter entered an Order approving of the settlement. A copy of that order has been requested and will be filed upon receipt by Boca Grande Club.

Boca Grande Club submits that approval of the settlement by the Circuit Court establishes that the settlement was in "good faith" even though such approval is not necessary under the rule of *Self v. Great Lakes Dredge & Dock Co.*, 832 F. 2d 1540 (11th Cir 1987).

CONCLUSION

In view of the foregoing the Court should forthwith enter an order determining that neither Florida Power & Light Company nor The O'Day Corporation have claims for indemnity against Boca Grande Club, Inc. The order should further provide that the settlement between Boca Grande Club, Inc. and the individual Stipulating Claimants bars any claims for contribution that Florida Power & Light Company and The O'Day Corporation may otherwise have had. Upon the authority of *Self v. Great Lakes Dredge & Dock Company*, 832 F. 2d 1540 (11th Cir 1987) and the other authorities cited above, summary judgment should be entered in favor of Boca Grande Club, Inc. and against Florida Power &

Light Company and The O'Day Corporation upon the claims for indemnity and contribution.

Respectfully submitted,
MACFARLANE, FERGUSON,
ALLISON & KELLY
/s/ _____
Jack C. Rinard, Esquire
Florida Bar No. 095376
Post Office Box 1531
Tampa, Florida 33601
(813) 223-2411
Attorneys for Boca Grande Club, Inc.

(Certificate of service omitted in printing)

FULL AND COMPLETE GENERAL RELEASE

WHEREAS, on April 23, 1988, Robert J. Polackwich, M.D. and Jonathan Richards were in an accident on the navigable waters adjacent to Boca Grande, Florida; and

WHEREAS, as a result of said accident, Robert J. Polackwich, M.D. and Jonathan Richards died; and

WHEREAS, as a result of the deaths of Robert J. Polackwich, M.D. and Jonathan Richards, representatives of their respective estates filed lawsuits in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, against Boca Grande Club, Inc., and other defendants; and

WHEREAS, as the result of the accident which involved a 16' Prindle Catamaran owned by Boca Grande Club, Inc., Boca Grande Club, Inc. commenced an action in United States District Court, Middle District of Florida, Tampa Division, seeking exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §181 et seq; and

WHEREAS, the representatives of the estates of Robert J. Polackwich, M.D. and Jonathan Richards, and others (all of whom are hereinbelow identified as "Claimants") filed claims in the limitation of liability action pending in United States District Court; and

WHEREAS the Plaintiffs in the actions pending in the Fifteenth Judicial Circuit Court in and for Palm Beach County, Florida, and all of those who have filed claims for damages for the deaths of Robert J. Polackwich, M.D. and Jonathan Richards in the limitation action pending in United States District Court, Middle District of Florida, Tampa Division, desire to settle all of their claims against Boca Grande Club, Inc. and its vessel;

Exhibit "A"

ACCORDINGLY, KNOW ALL MEN BY THESE PRESENTS:

Receipt of the sum of Two Hundred Twenty Five Thousand and No/100 Dollars ($225,000.00) lawful money of the United States to them in hand paid by Boca Grande Club, Inc., is hereby acknowledged by:

Alan S. Polackwich, Sr.

Alan S. Polackwich, Sr. as personal representative of the estate of Dr. Robert J. Polackwich, Deceased

Stephanie J. Polackwich

Stephanie J. Polackwich as personal representative of the estate of Jonathan Richards, Deceased

Stephanie J. Polackwich as mother and natural guardian of Robert Jamison Polackwich, a minor

Trudy Bergund, as mother and natural guardian of Nathan Polackwich, a minor

Alphonsus J. Polackwich

Alphonsus J. Polackwich as personal representative of the estate of Eleanor A. Polackwich, Deceased.

All of the foregoing individuals are hereinafter collectively referred to as "Claimants."

Claimants further acknowledge receipt of the aforesaid sum of money as total consideration for any and all claims by Claimants against the Released Parties only. Claimants have released, remised, acquitted and forever discharged, and by this Full and Complete General Release do release, remise, acquit and forever discharge only Boca Grande Club, Inc., and its successors and assigns, and the 16' Prindle Catamaran Sailing Vessel Hull No.

SUR06214M82E, together with its owner, charterer, operator, crew and insurers, collectively hereinafter referred to as the Released Parties, of and from all manner of actions, torts, injuries, causes of action, damages, contracts, claims, costs, expenses and demands whatsoever in law, in equity, in admiralty or otherwise, which Claimants, individually, jointly, severally or any of them, ever had, now have, or hereafter can, shall or may have against the Released Parties only upon, by reason of, or in any way growing out of any matter whatsoever arising from the injury and deaths of Robert A. Polackwich, M.D., and Jonathan Richards while aboard the 16' Catamaran Sailing Vessel on April 23, 1988.

This Full and Complete General Release as to the Released Parties only includes any claim by Claimants against the Released Parties only for any and all injuries, loss and damage, known or unknown, directly or indirectly sustained or suffered by Claimants, individually, jointly, severally, or any of them, arising out of or connected with a collision between the mast of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E and power lines crossing the navigable waters of Gasparilla Pass, including the rental from Boca Grande Club, Inc., usage, or operation of the 16' Prindle Catamaran Sailing Vessel, Hull No. SUR06214M82E on April 23, 1988, for which claims have been made against the Released Parties only in those certain lawsuits now pending in United States District Court, Middle District of Florida, Tampa Division, and the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, which cases are, respectively, styled as:

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No.: 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF
BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT, STATE OF FLORIDA, IN AND FOR PALM BEACH COUNTY, FLORIDA, CIVIL DIVISION

Case No. CL89-9670 AH

STEPHANIE J. POLACKWICH, as Personal Representative
of the Estate of JONATHAN RICHARDS, deceased,
Plaintiff,
vs.
FLORIDA POWER AND LIGHT COMPANY, O'DAY
CORPORATION, PRINDLE CATAMARAN, INC.,
SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE,
LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE
CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR
PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

ALAN S. POLACKWICH, SR., as Personal Representative

of the Estate of ROBERT J. POLACKWICH, deceased,
Plaintiff,
vs.
FLORIDA POWER AND LIGHT COMPANY, O'DAY
CORPORATION, PRINDLE CATAMARAN, INC.,
SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE,
LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE
CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR
PUNTA CORPORATION, and BOCA GRANDE CLUB, INC.,
Defendants.

Claimants do hereby consent and agree that all of their claims and complaints against the Released Parties only made and outstanding against the Released Parties only in the aforementioned lawsuits shall be forthwith dismissed with prejudice. This Full and Complete General Release as to the Released Parties only does not in any way release or discharge FLORIDA POWER AND LIGHT COMPANY, O'DAY CORPORATION, PRINDLE CATAMARAN, INC., SURFGLAS INCORPORATED, LEAR-SIEGLER MARINE, LEAR-SIEGLER, INC., CATALINA BOATS MANUFACTURING COMPANY, CATALINA YACHTS INC., PERFORMANCE CATAMARAN, INC., BANGOR PUNTA MARINE, BANGOR PUNTA CORPORATION, or their insurers. Claimants hereby specifically reserve all of their claims and actions against said parties, and nothing contained in this Full and Complete General Release shall be construed or deemed to be a release of Claimants' claims and actions against any of said parties.

It is expressly understood and agreed that the acceptance of the aforesaid sum of money is in full accord and satisfaction of disputed claims by and between the parties to this settlement only, which claims are set out in the above identified lawsuits and that the payment of the aforesaid sum is not an admission of liability on the part of the Released Parties, each of whom expressly denies liability.

In further consideration of the aforesaid sum of money being

paid to Claimants, Claimants, and each of them, do hereby covenant with and represent to the Released Parties that Claimants are the owners of the claims as to the Released Parties set forth in the above identified lawsuits.

In witness whereof, each of the Claimants hereinabove identified has executed this Full and Complete General Release as to the Released Parties only with effect as to each as and from the day and date of their respective signatures.

/s/ _____
Alan S. Polackwich, Sr.

/s/ _____
Alan S. Polackwich, Sr. As
Personal Representative of the
Estate of Dr. Robert J. Polackwich

State of Florida
County of Indian River

Personally appeared Alan S. Polackwich, Sr., an individual well known to me, who upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Dr. Robert J. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11,1994
BONDED THRU GENERAL INS. UND.

/s/ _____
Stephanie J. Polackwich

/s/ _____
Stephanie J. Polackwich as mother and Natural Guardian of Robert Jamison Polackwich, a minor

/s/ _____
Stephanie J. Polackwich as
Personal Representative of the
estate of Jonathan Richards

State of Florida
County of Hillsborough

Personally appeared Stephanie J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Robert Jamison Polackwich and the personal representative of the estate of Jonathan Richards and that she signed the foregoing Full and Complete General Release individually and as mother and natural guardian of Robert Jamison Polackwich and as the personal representative of the estate of Jonathan Richards, and that she signed the said release in her individual and representative capacities with full authority to so act and that her signatures were her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 4th day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
NOTARY PUBLIC STATE OF FLORIDA.
MY COMMISSION EXPIRES: MAR. 20, 1994.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

/s/ _____
Trudy Bergund as mother and
Natural Guardian of Nathan
Polackwich, a minor

State of Florida
County of Indian River

Personally appeared Trudy Bergund, an individual well known to me, and upon being duly sworn, deposed and said that she is the mother and natural guardian of Nathan Polackwich, a minor, and that she signed the above and foregoing Full and Complete General Release in her capacity as mother and guardian of Nathan Polackwich and that she is fully authorized to so act and her signature is her free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3rd day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:
Notary Public
State of Florida at Large
My Commission Expires Jan 20,1992

/s/ _____
Alphonsus J. Polackwich

/s/ _____

Alphonsus J. Polackwich as
Personal Representative of the
estate of Eleanor A. Polackwich

State of Florida
County of Indian River

Personally appeared Alphonsus J. Polackwich, an individual well known to me, and upon being duly sworn, deposed and said that he is the individual signing the above and foregoing Full and Complete General Release and that he signed said release both as an individual and in his capacity as the personal representative of the estate of Eleanor A. Polackwich and that he signed said release in his individual and representative capacities with full authority to so act and that his signatures were his free act and deed for all of the purposes expressed in said release.

Witness my hand and seal in the county and state aforementioned on this 3d day of December, 1990.

/s/ _____
Notary Public
State of Florida at Large

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. NOV. 11,1994
BONDED THRU GENERAL INS. UND.

Acceptance of Full and Complete General Release

Boca Grande Club, Inc., on behalf of the Released Parties, hereby accepts the above and foregoing Full and Complete General Release and acknowledges, accepts, and agrees to all of the provisions therein contained.

Boca Grande Club, Inc.

By: /s/ _____
Mary Keene, Manager

County of Charlotte
State of Florida

Personally appeared Mary Keene, an individual well known to me, who upon being duly sworn, deposed and said that she is the manager of Boca Grande Club, Inc. and that she acknowledges receipt of and accepts the above and foregoing Full and Complete General Release and she is fully authorized to execute the foregoing acceptance on behalf of Boca Grande Club, Inc.

Witness my hand and seal, this _____ day of _____, 1991

/s/ _____
Notary Public, State of Florida

My commission expires:
NOTARY PUBLIC, STATE OF FLORIDA.
MY COMMISSION EXPIRES: AUG. 27, 1993.
BONDED THRU NOTARY PUBLIC UNDERWRITERS.

(Exhibit B omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 88-1636-Civ-T-17A
IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT

OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16' PRINDLE
CATAMARAN SAILING VESSEL, HULL
NO. SUR06214M82E

MEMORANDUM OF LAW IN OPPOSITION TO THE BOCA GRANDE CLUB'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56, Federal Rules of Civil Procedure, and Local Rule 3.01, Rules of the District Court for the Middle District of Florida, Claimant, Florida Power & Light Company ("Florida Power & Light") hereby files its memorandum of law in opposition to the Boca Grande Club, Inc's ("Boca Grande Club") motion for summary judgment as to Florida Power & Light's claim for contribution.

PROCEDURAL POSTURE OF THE MOTION FOR SUMMARY JUDGMENT

This action was instituted by the filing of a petition for limitation of or exoneration from liability by the Boca Grande Club. This action arises out of a maritime accident which occurred on April 23, 1988, when a sailboat occupied by Robert J. Polackwich and Jonathan Richards came into contact with overhead electrical power lines near Boca Grande, Florida. The sailboat involved in

the incident was owned and maintained by the Boca Grande Club and had been rented by the Boca Grande Club's sailing concession manager to Polackwich and Richards. The sailboat was manufactured by the O'Day Corporation or its predecessor-in-interest. The overhead electrical power lines in question were owned and maintained by Florida Power & Light.

The representatives of the Estates of Polackwich and Richards instituted wrongful death actions in Florida State Circuit Court. Those state court actions initially named Florida Power & Light and the O'Day Corporation as defendants. Shortly after Florida Power & Light filed its third-party action against the Boca Grande Club in those state actions, the Boca Grande Club instituted this limitation of liability action pursuant to 46 U.S.C. S181 et.seq. Claims were filed against the Boca Grande Club by numerous claimants, including the Estate of Robert Polackwich, the Estate of Jonathan Richards, the O'Day Corporation, and Florida Power & Light.

Ultimately, the Boca Grande Club entered into a settlement agreement with the Estates of Polackwich and Richards. The terms of that settlement are set forth in documents previously filed with the Court.

This matter is now before the Court for consideration of the Boca Grande Club's motion for summary judgment. In essence, the Boca Grande Club argues that the Court should rule as a matter of law that the settlement made between the Boca Grande Club and the Estates of Polackwich and Richards operates to bar Florida Power & Light's claim for contribution against the Boca Grande Club.[1] The motion must be denied because the Boca Grande Club has misinterpreted the law, and because there are genuine issues of material fact which preclude summary judgment. Specifically, general maritime law requires that the settlement be made in good

1. The Boca Grande Club also argues that Florida Power & Light's indemnity claim is barred as a matter of law. Florida Power & Light does not oppose the Boca Grande Club's motion for summary judgment with respect to the indemnity claim.

faith in order to bar Florida Power & Light's right to seek contribution from the Boca Grande Club. The question of whether the settlement between the Boca Grande Club and the Estates was made in good faith raises genuine issues of material fact which preclude summary judgment.

THE APPLICABLE LAW REQUIRES THE DENIAL OF THE BOCA GRANDE CLUB'S MOTION FOR SUMMARY JUDGMENT

I. The Boca Grande Club has not satisfied the legal requirements for a summary judgment.

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), F.R.Civ.P. In making this determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf of Samples v. City of Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988). Furthermore, the moving party has the initial burden of establishing the absence of a genuine issue of fact. *Clark v. Coats & Clark, Inc.*, No. 908925, Slip 0p. at 2911, 2915 (11th Cir. April 19, 1991). Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is a material issue of fact that precludes summary judgment. *Id.*

The Boca Grande Club has not established the absence of a genuine issue of material fact. Pursuant to general maritime law, the settlement between the Boca Grande Club and the Estates will only operate as a bar to Florida Power & Light's claim for contribution if the Court finds that it was made in good faith. This determination involves material questions of fact that may not be resolved in a motion for summary judgment. For instance, whether Boca Grande's settlement with the Plaintiffs reasonably reflects the parties proportionate liability is a material question of fact that precludes summary judgment, and as a result, the Boca Grande Club's motion for summary judgment must be denied.

II. Under general maritime law, the settlement between the Boca Grande Club and the Estates must be in good faith in order to bar Florida Power & Light's contribution claim.

The Boca Grande Club asserts in its motion for summary judgment that the Eleventh Circuit implicitly rejected the rule that a settlement must be made in good faith in order to bar claims for contribution asserted by a non-settling defendant. In making this argument, the Boca Grande Club relies upon language in *Self v. Great Lakes Dredge & Dock Co.* which acknowledges that if a settlement bars a claim for contribution, there may be a disparity in the percentage of payment as between the settling and nonsettling tortfeasor. 832 F.2d 1540, 1547-8 *rehearing denied* 837 F.2d 1095 (11th Cir. 1987), *cert. denied* 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988). However, nowhere in *Self* did the court expressly reject the good faith standard. Furthermore, a more recent, decision by the Ninth Circuit indicates that the Eleventh Circuit has adopted the rule requiring that a settlement be made in good faith in order to operate as a bar to a nonsettling defendant's claim for contribution. *See Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989).

In *Miller v. Christopher*, the court held that under general maritime law a "good faith" settlement between a tortfeasor and a plaintiff bars a joint tortfeasor's claim of contribution. 867 F.2d at 907. The court pointed out that the case law is in some disarray over this issue due to the tension between the policy favoring full recovery for the plaintiff and the policy favoring final and efficient dispute resolution. *Id.* at 904. According to the court in *Miller*, the confusion over this issue is further demonstrated by the American Law Institute's inability to reach a consensus. The court explained that the Restatement (Second) of Torts §886A, comment m, delineates three possible approaches to the situation of the settling tortfeasor:

> (1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his equitable share of the plaintiff's claim; (2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and (3) reducing the claim of the plaintiff by the pro rata share of a settling tortfeasor's liability for damages, which has the effect of eliminating any reason to sue a settling tortfeasor for contribution.

Id. at 905. According to the court, the Restatement determined that the first approach was the "fairest solution", although it tended to discourage settlements. It was also noted in comment m that although the second approach encouraged settlements, it allowed for collusion between the settling tortfeasor and the plaintiff. However, the court stated that the "imposition of a prophylactic 'good faith' rule can help [prevent collusion], but such a rule calls 'the finality of the settlement into question until a court has passed on the issue of good faith." *Id.* The court also indicated that The Uniform Comparative Fault Act adopted the third approach because it supported the goals of the comparative negligence system. *Id.*

Additionally, the *Miller* decision held that the First and Eleventh Circuits have adopted the second approach and cited the Eleventh Circuit's decisions in *Ebanks v. Great Lakes Dredge & Dock Co.* and *Self. Miller*, 887 F.2d at 905-6 (citing *Ebanks*, 688 F.2d 716 (11th Cir. 1982), *cert. denied* 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983) and *Self*, 832 F.2d at 1546). The court in *Miller* agreed with the Eleventh Circuit's adoption of the second approach and held that a settlement, if it is found to be in good faith, bars a claim for contribution. *Id.* at 907. In reaching this decision, the court balanced the competing policies of avoiding collusion between the plaintiff and the settling defendant and promoting settlements. *Id.*

The good faith standard has been applied in numerous other cases in which the courts relied on various criteria to determine whether the settlements were made in good faith. *See e.g. Carpenter v. U.S.*, 710 F.Supp. 747, 751-3 (D.Nev. 1988) (factors to consider include (1) the amount paid, (2) the allocation of the

proceeds among the plaintiffs, (3) the insurance policy limits of settling defendants, (4) the financial condition of settling defendants, and (5) the existence of collusion, fraud, or tortious conduct aimed to injure the interests of non-settling defendants); *Tech-bilt, Inc. v. Woodward - Clyde & Associates*, 698 P.2d 159, 166 (Cal. 1985) (whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries); *In re MGM Grand Hotel Fire Litigation*, 570 F.Supp. 913, 927 (D.Nev. 1983) (good faith settlement by tortfeasor establishes affirmative defense to any claims for contribution); *Fuquay v. General Motors Corp.*, 518 F.Supp. 1065, 1069 (M.D. Fla. 1981) (pursuant to Section 768.31(5), *Florida Statutes*, a settlement must be in good faith in order to bar contribution claim); *Commercial Union Insurance Co. v. Ford Motor Co.*, 640 F.2d 210, 213 (9th Cir. 1981).

The Boca Grande Club claims that the approach requiring that settlements be made in good faith is "wasteful and unworkable". This claim is obviously defeated by the substantial case law in which the good faith standard has been applied. Significantly, the approach advocated by the Boca Grande Club does not follow any of the three alternatives recommended in the Restatement.

The good faith requirement adopted by the courts simply ensures that settlements are made with the intent to effectively resolve disputes to the mutual advantage of the settling parties and not to injure or exclude the non-settling party. The Court can ensure that a settlement is made in good faith by conducting a hearing to determine the relative degrees of fault and the strategic motivations for settling, and then ruling on whether the amount of the settlement is within the reasonable range of the Boca Grande Club's respective share of liability in light of the amount of damages alleged by the Estates in this case. *See Miller*, 807 F.2d at 907. In the alternative, the Court can determine the proportionate shares of liability in the wake of the state court action. In light of the fact that the federal action is stayed pending the resolution of the state court action, the Court may allow the non-settling defendants to assert contribution claims against the Boca Grande Club and then

determine whether the settlement reasonably reflects the Boca Grande Club's share of liability after the verdict is rendered in state court. *Id.* Pursuant to case law and policy considerations, the Court must find that the settlement amount is reasonably proportionate to the settling defendant's share of liability in order to hold that the settlement was made in good faith. *See e.g. Miller v. Christopher*, 887 F.2d at 908; *Tech-bilt, Inc. v. Woodward-Clyde & Associates*, 698 P.2d 159, 166 (Cal. 1985).

Furthermore, the good faith rule does not discourage settlements. If a tortfeasor and a plaintiff perceive a settlement as beneficial, they will pursue the settlement even if such settlement is subject to an evaluation by the court. Clearly, the only settlements which may be discouraged by the good faith standard are those settlements that are not made in good faith. The primary case cited by the Boca Grande Club for the proposition that the good faith rule discourages settlements involves a contribution claim asserted by a settling defendant who was unhappy with its settlement against another settling defendant, based upon the argument that it paid more in the settlement than its percentage of liability. *See Great Lakes Dredge & Dock Co. v. Robert Miller*, 1990 A.M.C. 2247, 2251 (M.D.Fla. 1990). In contrast, Florida Power & Light has not settled with the Estates and only seeks to prevent the Boca Grande Club from avoiding its responsibility for its share of fault by entering into a settlement that was not made in good faith.

Although the Circuits are in conflict, it is clear from the decisions in *Miller* and *Self* that the First, Ninth, and Eleventh Circuits have adopted the good faith requirement for settlements in maritime actions. Accordingly, the settlement between the Boca Grande Club and the Estates must be found to be in good faith in order to bar Florida Power and Light's contribution claim.

III. The Boca Grande Club has misinterpreted the law in regard to whether a settlement must be made in good faith in order to bar a non-settling defendant's claim for contribution.

In addressing the effect of a settlement on contribution claims

between potential tortfeasors, the courts have attempted to resolve three important and competing policies:

(1) full recovery for the plaintiff;

(2) proportionate liability pursuant to the doctrine of comparative fault; and

(3) promoting settlement.

See e.g. Edmonds v. Compagnie Generate Transatlantique, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, *rehearing denied* 837 F.2d 1095 (11th Cir. 1987), *cert. denied* 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988); *Drake Towing Co., Inc. v. Meisner Marine Construction Co.*, 765 F.2d 1060, *rehearing denied* 773 F.2d 1239 (11th Cir. 1985); *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), *cert. denied* 460 U.S. 1083, 103 S.Ct. 1774, 76 L.Ed.2d 346 (1983); *Luke v. Signal oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975).

The United States Eleventh Circuit Court of Appeals in *Ebanks* held that under maritime law, a plaintiff may sue any or all of the defendants in an action and is entitled to full recovery from any one of them regardless of the percentage of fault. 688 F.2d at 718 [citing *Edmonds v. Compagnie Generate Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed.2d 521 (1979) (a plaintiff in a maritime action can recover the full amount from any of the tortfeasors pursuant to the remedial policy of full recovery for the plaintiff)]. In *Ebanks*, the court held that the lower court erred in apportioning the percentage of fault between the defendant at trial and the settling defendant. Additionally, the court emphasized that if the defendant at trial was forced to pay damages that exceeded its percentage of fault, it could seek contribution from the settling defendant in a different action. *Id.*, at 722. Accordingly, the Eleventh Circuit in *Ebanks* allowed contribution against a settling defendant in a maritime action pursuant to the policy of providing full recovery for the plaintiff.

Similarly, in *Drake Towing Co., Inc. v. Meisner Marine Construction Co.* , where the issue was whether the court could decrease the defendant's liability by considering the settling defendant's percentage of negligence, the court held that as in Ebanks the plaintiff is entitled to recover the full amount of damages from the defendant at trial. The court further emphasized that the defendant at trial has the right to seek contribution from the settling defendant and may implead that defendant in order to allocate liability in a single action. 765 F.2d at 1067-8. The court balanced the competing policies of full recovery for the plaintiff and comparative fault and held that the right to seek contribution was not barred by a settlement between the plaintiff and the settling defendant. *Id.*

The rule set forth in *Luke v. Signal Oil & Gas Co.* and relied upon by the court in *Self* does not control the court's decision in this case for two reasons. First, the court in *Self* did not address the issue of whether a settlement must be in good faith. Second, the rule set forth by the court in *Luke* was based on Louisiana law, not maritime law, and general maritime law is the law that must be applied in this case. *See Miami Valley Broadcasting Corp. v. Lang*, 429 So.2d 1333 (Fla. 4th DCA 1983) ("It is beyond question that the wrong complained of was a maritime tort, occurring in navigable waters, which makes the claim subject to federal admiralty jurisdiction."); *Still v. Dixon*, 337 So.2d 1033 (Fla. 2d DCA 1976) ("... it is maritime law, not state law, that is the substantive law applied in maritime torts accruing on navigable waters in this country, irrespective of whether the action is brought in a state or federal court.") Accordingly, the Boca Grande Club erred in relying solely on the court's decision in *Self* to resolve the question of whether a "good faith" settlement bars a claim of contribution under maritime law, and it is clear that the courts are imposing the good faith requirement recommended in the Restatement in order to allow a settlement to bar a claim for contribution.

IV. Whether the settlement between the Boca Grande Club and the Estates was made in good faith creates genuine issues of material fact which preclude summary judgment.

In *Miller*, the court applied California's standard for good faith in an action under general maritime law. 882 F.2d at 907-8. The court ruled,that if the amount of the settlement falls within the "ballpark" of the defendant's liability, it is deemed a good faith settlement. The court reasoned that such a standard would best serve the competing policies of avoiding collusion between the parties, allowing for comparative fault and full recovery, and encouraging settlements. In making the determination of whether the settlement was made in good faith, the court recognized that the settlement need not represent the actual degrees of liability. *Miller*, 887 F.2d at 908. Rather, it was noted by the court that settlements are often discounted to reflect the cost of trial or the uncertainties of the outcome of a trial. *Id.* However, the court held that the settlement must be a good faith determination of the parties' relative liability and must be more than a bargain with the intent to avoid a claim for contribution or indemnity. *Id See also Owen v. United States*, 713 F.2d 1461, 1466 (9th Cir. 1983); *Commercial Union Insurance Co. v. Ford Motor Co.*, 640 F.2d 210, 213 (9th Cir.), *cert. denied* 454 U.S. 858, 102 S.Ct. 310, 70 L-Ed.2d 154 (1981); *Carpenter v. U.S.*, 710 F.Supp. 747, 751-3 (D.Nev. 1988).

The issue of whether the settlement between the Boca Grande Club and the Estates represents a good faith determination of the parties' relative liability involves questions of fact. For instance, the court must determine whether the amount of the settlement, which is Two Hundred Twenty-Five Thousand Dollars ($225,000.00), reasonably reflects the Boca Grande Club's proportionate share of liability. The record is replete with evidence of the Boca Grande Club's potential liability. The following undisputed facts are relevant to the Boca Grande Club's proportionate share of liability:

1. Boca Grande Club, Inc. owned and maintained the sixteen foot (16') Prindle catamaran bearing hull number SUR06214M82E which is involved in this limitation proceeding ("the catamaran").

2 The catamaran was equipped with a mast which was capable of conducting electricity if it came into contact with a source of

electrical power. (Deposition of Stephen Ferguson at p.18, lines 9-12; p.27, lines 12-14, previously filed with the Court).

3. Sailboats equipped with masts which do not conduct electricity have been available since at least 1984 or 1985, a period of time well prior to this incident. (Deposition of Gary Mansell at pp.6-7, 15, previously filed with the Court).

4. On April 23, 1988, Robert J. Polackwich, Jr. ("Polackwich") and Jonathan Richards ("Richards") rented the catamaran from Boca Grande Club, Inc. in Boca Grande, Florida.

5. On April 23, 1988, Mr. Stephen Ferguson ("Ferguson") was the manager of the sailboat rental concession operated by the Boca Grande Club, Inc. By virtue of his position, Ferguson was empowered to make decisions regarding the circumstances under which sailboats owned by the Boca Grande Club would be rented and to whom. (Deposition of Stephen Ferguson at p. 22, lines 6-14).

6. Prior to renting the catamaran to Polackwich and Richards, Ferguson did not conduct a sea trial or other procedures to determine Richards' or Polackwich's sailing skills. Rather, Ferguson relied on Richards apparent familiarity with sailing as demonstrated by a single conversation covering the nomenclature of sailing and the like. (Deposition of Stephen Ferguson at p.9, lines 23-25; p.10, lines 1-25; p.11, lines 1-25; p.12, lines 1-25; p.14, lines 23-25; p.15, lines 1-10; p.49, line 15; p.50, lines 1-5.).

7. At approximately 1:00 p.m. on April 23, 1988, Polackwich and Richards were severely shocked when the catamaran's mast made contact with overhead electrical distribution lines owned and maintained by Florida Power and Light.

8. Prior to renting the catamaran to Polackwich and Richards, Ferguson knew that sailing in the vicinity of the accident scene was an unsafe practice because it was possible to hit the overhead electrical distribution lines with a sailboat mast. (Deposition of Stephen Ferguson at p.13, lines 11-19; p.41, lines 19-25; p.42, lines 1-2).

9. Prior to renting the catamaran to Polackwich and Richards, Ferguson knew that Polackwich and Richards could sail the catamaran into the area where the accident occurred. (Deposition of Stephen Ferguson at p.37, lines 13-18).

10. Despite this knowledge, Ferguson failed to warn Polackwich and Richards of the existence of the overhead electrical distribution lines (Deposition of Stephen Ferguson at p.13, lines 14-25; p.14, lines 1-18) or about the dangers of sailing the catamaran near the overhead electrical distribution lines (Deposition of Stephen Ferguson at p.19, lines 4-7).

11. Despite this knowledge and his limited familiarity with the sailing skills of Polackwich and Richards, Ferguson made no effort to stop or collect them as they sailed out of sight toward the north in the general direction of the accident scene (Deposition of Stephen Ferguson at p.21, lines 11-15; p.43, lines 18-25; p.44, lines 1-10).

12. In addition, Ferguson provided no instruction to Polackwich and Richards regarding means or methods of extricating themselves from any danger they encountered. Similarly, the Boca Grande Club, Inc. did not equip the catamaran with any aids to navigation or any means with which Polackwich and Richards could extricate themselves from danger, such as a radio or emergency safety instruction (Deposition of Stephen Ferguson at p.30, lines 18-25; p.31, lines 1-11).

13. The Boca Grande Club, Inc. failed to equip the catamaran with a mast which could be easily dropped while underway even though such equipment was available. (Deposition of Stephen Ferguson at p.31, lines 22-25; p.32, lines 1-5; Deposition of Gary Mansell at pp.13-14). As a result the mast of the catamaran could not be lowered except by the expenditure of extraordinary effort (Deposition of Stephen Ferguson at p.25, lines 1-14).

In light of this evidence, genuine issues of material fact exist with respect to whether the Boca Grande Club's proportionate

share of liability is reasonably reflected in its settlement with the Estates.

The court must also consider whether the settlement represents a good faith effort to resolve the dispute before a settlement can be asserted as a defense to a non-settling defendant's claim for contribution. In *Carpenter v. U.S.*, the court set forth various factors to consider in determining whether a settlement was made in good faith. 710 F.Supp. at 751-3. The factors include: (1) the amount paid in the settlement; (2) the insurance policy limits of the settling defendant; (3) the financial condition of the settling defendant; and (4) the existence of collusion, fraud, or tortious conduct aimed to injure the interests of the non-settling defendants.

In this case, the Boca Grande Club paid only Two Hundred Twenty-Five Thousand Dollars ($220,000.00) its settlement with the Estates. However, the Boca Grande Club has applicable insurance in the amount of One Million Dollars ($1,000,000.00). (See Petitioner, the Boca Grande Club's answer to interrogatory five of the standard interrogatories and answer to interrogatory one of the interrogatories propounded by Alan S. Polackwich, Sr., as Personal Representative of the Estate of Robert J. Polackwich attached hereto as Exhibit "A"). Additionally, the present ownership and maintenance of the Boca Grande Club indicates that the Boca Grande Club, Inc., is solvent and has the financial ability to pay in this case. The amount of the settlement creates a genuine issue of material fact with respect to the question of good faith in light of the Boca Grande Club's insurance policy limits and its apparent financial ability to pay.

Additionally, the underlying motivations of this settlement are at issue. Although Florida Power & Light disputes the rationality of the Estates' position, counsel for the Estates have demanded in excess of Twenty Million Dollars ($20,000,000.00) from Florida Power & Light Company. In light of such a demand and the above analysis of the Boca Grande Club's potential liability, the settlement at issue must be seen as a token from the Estates' perspective. The possibility of collusion on the part of the Estates and the

Boca Grande Club in an attempt to serve interests that are completely irrelevant to the parties relative degrees of liability creates an issue of fact as to whether the settlement was made in good faith. Such interests might include the Boca Grande Club's interest in using a settlement as a means of avoiding claims for contribution and the Estates' interest in avoiding the non-jury limitation of liability proceedings and focusing on a state court jury trial as a more beneficial forum in which to present their claims. The fear of delayed adjudication cannot be considered because the court appeared ready to try this case on a previous docket.

Accordingly, because genuine issues of material fact exist as to whether the settlement was made in good faith, the Boca Grande Club's motion for summary judgment against Florida Power & Light's claim for contribution must be denied.

CONCLUSION

In light of the recent decisions of the Ninth and Eleventh Circuits, the settlement between the Boca Grande Club and the Estates does not bar Florida Power & Light's claim for contribution unless the Court finds that the settlement was made in good faith. The good faith standard as applied by the courts requires that the settlement fairly reflect the relative degrees of liability and not be intended to foreclose a claim for contribution from a nonsettling defendant. As a result, the court must determine whether the settlement was made in good faith before the settling defendant can assert such a settlement as a bar to a claim for contribution. Because the question of whether the settlement was made in good faith involves genuine issues of material fact, the Boca Grande Club's motion for summary judgment must be denied.

Accordingly, for the reasons stated above, Florida Power & Light requests that this Court enter an order denying the Boca Grande Club's motion for summary judgment.

(Certificate of service omitted in printing)

/s/ _____
Christopher S. Knopik
Florida Bar Number 378348
Tami L. Baldinger
Florida Bar Number 0857513
YERRID, KNOPIK &
VALENSUELA, P.A.
101 E. Kennedy Boulevard
Barnett Plaza, Suite 2160
Tampa, Florida 33602
(813) 222-8222

(Exhibit A omitted in printing)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 88-1636-CIV-T-15A

IN ADMIRALTY

IN THE MATTER OF THE COMPLAINT OF

BOCA GRANDE CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

ORDER

This action was brought by Boca Grande Club seeking limitation of liability for claims stemming from a maritime accident in which the mast of a sailboat struck a power line resulting in the deaths of two individuals. The estates of the deceased brought suit in state court against Florida Power and Light Corporation ("FPL") and the O'Day Corporation, the boat's manufacturer. Those defendants brought third party actions for contribution and indemnity against the Boca Grande Club which owned and leased the sailboat to the decedents. In response, Boca Grande brought this action.

Subsequent to the institution of this action, Boca Grande entered into settlement agreements with the decedents' estates. In its motion for summary judgment Boca Grande asserts that those settlement agreements bar FPL's claim for contribution and indemnity.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In reaching a summary judgment decision the court must view the facts in the light most favorable to the non-moving party. *United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990).

Initially, the Court notes that FPL concedes that its claim for indemnity is barred as a matter of law. Accordingly, the only issue remaining before this Court is whether FPL's contribution claim is likewise barred.

The parties agree that this is an action invoking the maritime jurisdiction of this Court. Accordingly, maritime law of the Eleventh Circuit provides the applicable substantive law. Under the current case law, a joint tortfeasor is barred from seeking contribution from a settling joint tortfeasor and the plaintiff may recover the full amount of damages, minus the amount received from the settling defendant, from the remaining tortfeasors. *Self v. Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied* 486 U.S. 1033 (1988).

FPL recognizes that the settlement bar exists, yet argues that the bar is only applicable if the settlement was entered in good faith. FPL argues that at least one other circuit has adopted a good faith requirement, see *Miller v. Christopher* (887 F.2d 902 (9th Cir. 1989), and §886A of Restatement (Second) of Torts suggests that a good faith requirement may be warranted. However, the Eleventh Circuit has neither accepted or rejected a good faith requirement. *See Self*, 832 F.2d at 1547.

This Court declines to impose a good faith requirement where previously none existed. Accordingly, it is ORDERED:

1. Boca Grande's motion for summary judgement as to the claims of Florida Power and Light Company (D-174) is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estates of the decedents.

2. The Clerk is directed to administratively close this file pending the outcome of the bankruptcy proceedings currently underway for defendant O'Day Corporation.

3. Boca Grande Club, Inc. is directed to report to the Court upon the conclusion of the O'Day Corporation's bankruptcy proceedings.

DONE AND ORDERED at Tampa, Florida this 26th day of March, 1992.

/s/_____
WILLIAM J. CASTAGNA
UNITED STATES DISTRICT JUDGE

Copies to
Counsel of Record

United States District Court
MIDDLE DISTRICT OF FLORIDA

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 88-1636-Civ-T-15A

IN THE MATTER OF THE COMPLAINT OF

BOCA GRAND CLUB, INC. FOR
EXONERATION FROM OR LIMITATION
OF LIABILITY AS OWNER OF A 16'
PRINDLE CATAMARAN SAILING VESSEL,
HULL NO. SUR06214M82E

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Boca Grande's Motion for Summary Judgement as to the claims of Florida Power and Light Company is GRANTED and both the indemnity and contribution claims brought by Florida Power and Light Company, Inc. against Boca Grande Club, Inc. are barred by Boca Grande's settlement with the estate of the decedents.

March 27, 1992
Date

David L.Edwards
Clerk
/s/ _____
(By) Deputy Clerk

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 92-2391

District Court No. 88-1636-CIV

IN THE MATTER OF THE COMPLAINT OF BOCA GRANDE CLUB, INC., for exoneration from or limitation of liability as owner of a 16' Prindle catamaran sailing vessel hull no. SUR06214M82E,

Plaintiff-
Counterclaim defendant-
counterclaim Plaintiff-
Appellee,

versus

ALAN POLACKWICH, ROBERT POLACKWICH, JONATHAN RICHARDS, ALPHONSUS J. POLACKWICH, and ELEANOR A. POLACKWICH,

Defendants-
Counterclaim Plaintiffs,

STEPHANIE POLACKWICH, as personal Representative of the Estate of Jonathan Richards,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant,

O'DAY CORPORATION,

Defendant-
Counterclaim Plaintiff
Crossclaim Plaintiff-
Crossclaim Defendant,

FLORIDA POWER & LIGHT COMPANY, INC.,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant-
Crossclaim Plaintiff-
Counterclaim Defendant-
Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby VACATED; and that this cause be and the same is hereby REMANDED to said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal.

---

*Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Entered: May 12, 1993
For the Court: Miguel J. Cortez, Clerk
By: /s/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: JULY 15, 1993

BOCA GRANDE CLUB, INC.
v.
POLACKWICH

IN THE MATTER OF THE COMPLAINT OF BOCA GRANDE CLUB, INC., for exoneration from of limitation of liability as owner of a 16' Prindle catamaran sailing vessel hull no. SUR06214M82E,

Plaintiff-
Counterclaim defendant-
Counterclaim plaintiff-
Appellee,

versus

ALAN POLACKWICH, ROBERT POLACKWICH, JONATHAN RICHARDS, ALPHONSUS J. POLACKWICH, and ELEANOR A. POLACKWICH,

Defendants-
Counter claim plaintiffs,

STEPHANIE POLACKWICH, as personal representative of the Estate of Jonathan Richards,

Defendant-
Counterclaim Plaintiff-
Crossclaim Defendant,

O'DAY CORPORATION,

Defendant-
Counterclaim Plaintiff
Crossclaim Plaintiff-
Crossclaim Defendant,

FLORIDA POWER & LIGHT COMPANY, INC.,
Defendant-

Counterclaim Plaintiff-
Crossclaim Defendant-
Crossclaim Plaintiff-
Counterclaim Defendant-
Appellant.

No. 92-2391
United States Court of Appeals,
Eleventh Circuit.

May 12, 1993.

Appeal from the United States District Court for the Middle District of Florida, William J. Castagna, Judge.

Before TJOFLAT, Chief Judge, CARNES, Circuit Judge, and BRIGHT*, Senior Circuit Judge.

PER CURIAM:

In this case, the district court, invoking the settlement bar rule suggested by *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 SCt. 2017, 100 L.Ed.2d 604 (1988), rejected Florida Power & Light Company's (FP & L's) claim for contribution against Boca Grande Club, Inc. (Boca Grande) and gave Boca Grande summary judgement. After judgement was entered and this appeal was taken, *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, —U.S.—, 113 S.Ct. 484, 121 LEd.2d 388 (1992), concluded that the issue of contribution was not before the court in *Self*, and held that, under maritime law, a tortfeasor is not precluded form seeking contribution from a joint tortfeasor who has settled. *Id.* at 1578, 1582-83. Accordingly, we must vacate the district court's ruling and remand the case for further proceedings. In doing so, we do not pass on Boca Grande's

argument that we should affirm the district court's summary judgement because, on the record before us, FP & L is not entitled to contribution.

VACATED and REMANDED for further proceedings.

* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

A True Copy - Attested:
Clerk, U.S. Court of Appeals,
Eleventh Circuit
By: _____
Joyce L. Pope
Deputy Clerk
Atlanta, Georgia

No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

WHETHER THIS COURT SHOULD ESTABLISH A UNIFORM RULE, APPLICABLE IN MARITIME CASES, THAT SETTLEMENT BETWEEN A JOINT TORTFEASOR AND A PLAINTIFF BARS ALL CLAIMS FOR CONTRIBUTION BY NON-SETTLING DEFENDANTS AGAINST THE SETTLING TORTFEASOR?

LIST OF PARTIES

The parties are Petitioner, Boca Grande Club, Inc., and Respondent, Florida Power & Light Company. The parent of Petitioner is Great American Insurance Company.

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No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the court of appeals (J.A. 92) is reported at 990 F.2d 606. The order of the district court is not reported. (J.A. 88).

JURISDICTION

The judgment of the court of appeals was entered on May 12, 1993. The Petition for Writ of Certiorari was filed on August 4, 1993 and was granted on September 28,

1993. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

"The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . " U.S. Const. art. III, § 2, cl.1.

STATEMENT OF THE CASE

On April 23, 1988, a sailboat collided with a high power electric line which spanned the navigable waters of the United States just north of Gasparilla Island, in Lee County, Florida. The sailboat was owned by Boca Grande Club, Inc., Petitioner (hereafter Boca Grande Club). The electric line was designed, constructed, owned and maintained by Florida Power & Light Company, Inc., Respondent (hereafter Florida Power). The sailboat was rented by Boca Grande Club to Robert Polackwich, a club member. Robert Polackwich and Jonathan Richards, his stepson, were operating the sailboat at the time of collision; both died from electrocution after the collision.

In June 1988, a lawsuit was started against Boca Grande Club and Florida Power by the personal representatives of Robert Polackwich and Jonathan Richards, and other parties, (all hereinafter collectively referred to as "Claimants") in state court seeking damages for wrongful death. Thereafter, in October 1988, Boca Grande Club started this action in United States District Court,

Middle District of Florida, Tampa Division, seeking limitation of liability as owner of the sailboat involved in the collision. (J.A. 5). Claims against Boca Grande Club were filed in the limitation action on behalf of all of the Claimants. (J.A. 27). A claim for indemnity and contribution was filed in the limitation action by Florida Power. (J.A. 10) The O'Day Corporation, the manufacturer of the sailboat, also a defendant in the claimant's state court wrongful death action, filed its claim in the limitation action seeking indemnity and contribution from Boca Grande Club. (J.A. 16).

In December 1989, Florida Power served a third party complaint against Boca Grande Club in the state court action started by Claimants. Boca Grande Club responded by filing a motion for an injunction in United States District Court. (R1-50). In February 1990, the district court entered its order enjoining the prosecution of claims against Boca Grande Club in any proceeding other than the limitation action. (R2-55).

In June 1990, Boca Grande Club filed a motion in the limitation action seeking summary judgment as to all of the claims pending in the limitation case. (R3-99). Thereafter, Boca Grande Club and the Claimants worked out a settlement of all claims filed by the Claimants in the limitation action and entered into a General Release. (J.A. 63). In December 1990, Boca Grande Club and the Claimants filed a Stipulation and Joint Motion seeking dismissal of all of Claimants' claims filed in the limitation action. (J.A. 37). In March 1991, the district court granted the joint motion and dismissed all of Claimants' claims. (J.A. 48).

In April 1991, Boca Grande Club filed another motion which sought summary judgment as to the indemnity and contribution claims of Florida Power and the boat manufacturer, the only claims left in the limitation case. (J.A. 51). On March 26, 1992, the district court granted summary judgment in favor of Boca Grande Club as to the indemnity and contribution claim of Florida Power and administratively closed the file with respect to the claims of the O'Day Corporation pending the outcome of bankruptcy proceedings involving the boat builder. The district court entered judgment in favor of Boca Grande Club following its order granting summary judgment. (J.A. 91).

In granting summary judgment the district court relied on the settlement bar rule established in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988). (J.A. 88). On April 16, 1992, the Eleventh Circuit Court of Appeals decided *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 484, 121 L.Ed 2d 388 (1992). On April 21, 1992, Florida Power filed its notice of appeal from the judgment entered in favor of Boca Grande Club. (R6-187). The summary judgment granted to Boca Grande Club by the district court was reversed by the court of appeals on May 12, 1993. (J.A. 93).

SUMMARY OF ARGUMENT

The basic question the Court must answer in this case is whether to adopt for application in maritime cases a rule that permits a settling tortfeasor to close his file and be free of claims for contribution by non-settling defendants. If the Court chooses to adopt such a rule, the Court will also need to decide how the settlement is to be treated. That is, whether it is to be set-off *pro tanto* against the plaintiff's recovery or, whether the settlement is to be treated as the extinguishment of the settling defendants' proportional fault for the entire liability and deducted *pro rata* from the plaintiff's claim.

Petitioner would be satisfied with either the *pro tanto* or *pro rata* rule because it would cure the error committed in the instant case. However, Petitioner submits that the *pro rata* or comparative fault rule is preferable because it extinguishes the proportional share of the liability of the settling defendant and makes contribution unnecessary.

All maritime courts outside of the eleventh circuit that have considered this issue have opted in favor of a settlement bar rule, either *pro tanto* or *pro rata*. The Eleventh Circuit Court of Appeals stands alone in adopting a rule which permits contribution claims to be prosecuted against a settling defendant. The decision by the court of appeals effectively negates settlement as a means for terminating multi-party maritime litigation in the eleventh circuit. The decision of the court of appeals has also created conflict within the eleventh circuit. For these reasons the decision below must be reversed.

The decision by the court of appeals below was not required by any decision of this Court. A settlement bar

rule will accommodate the principles of contribution, joint and several liability and comparative fault, which are fundamental to maritime law. A settlement bar rule will also accommodate other basic legal principles such as the efficient utilization of judicial resources and the termination of legal disputes by settlement.

Petitioner also submits that a settlement bar should be self-operative and require no oversight or administration by a court. Adoption of the *pro rata* rule which extinguishes the need for contribution results in a self-operative rule.

The Court should reverse the decision of the court of appeals in this case and establish a settlement bar rule to be applied in this case and in all future maritime cases.

ARGUMENT

Relying upon its decision in *Great Lakes Dredge & Dock Co. v. Tanker*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed 2d 388 (1992) (hereinafter "*Great Lakes*"), the Eleventh Circuit Court of Appeals reversed the summary judgment granted in favor of Boca Grande Club as to the contribution claim of Florida Power. In its opinion the court of appeals stated that "under maritime law a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606, 607 (11th Cir. 1993). (hereinafter "*Polackwich*") (J.A. 92).

The issue before this Court is, therefore, whether the decision of the Eleventh Circuit Court of Appeals in this

case, which was based on *Great Lakes*, should be reversed, with the rule that settlement bars further prosecution of contribution claims by non-settling defendants to be herein and henceforth applied in all maritime cases.

I

SETTLEMENT SHOULD BAR CLAIMS FOR CONTRIBUTION

The fundamental question the Court must answer in this case is whether settlement terminates contribution claims against settling defendants in maritime cases. If the Court implements a settlement bar rule, the Court will also need to decide whether the amount of the settlement is to be deducted *pro tanto* from a plaintiff's overall recovery or, alternatively, treated as the extinguishment of the settling defendant's proportional share of the entire liability.

Boca Grande Club submits that there ought to be a settlement bar rule because if non-settling parties are free to prosecute contribution claims against a settling defendant, there will be no settlements. Either the *pro tanto* or *pro rata* rule would operate to relieve Boca Grande Club from further litigation in the instant case. However, Boca Grande Club submits that the rule which obviates contribution because it extinguishes the settling defendant's proportional share of the total liability is more workable and will operate to make more efficient use of available judicial resources.

Before the decision in *Great Lakes*, a number of federal courts considered the question of the effect of settlement upon the continued prosecution of contribution

claims against the settling defendant in maritime cases. Those courts all opted for a rule that either barred further prosecution of contribution claims or made contribution unnecessary. *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979) (contribution unnecessary because settlement extinguishes proportional fault of settling defendant); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989) (settlement in good faith bars contribution by non-settling defendants); *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266 (8th Cir. 1991) (contribution unnecessary because it represents equitable share of a settling defendant's liability); *Stanley v. Bertram-Trojan, Inc.*, 781 F.Supp. 218 (S.D.N.Y. 1991) (settlement bars prosecution of contribution claims against settling defendant); *In Re The Glacier Bay*, 1993 AMC 1530 (D. Alaska 1993) (applying the rule which obviates contribution). More recently, and in the face of the decisions in *Great Lakes* and *Polackwich*, the Seventh Circuit Court of Appeals and the Alabama Supreme Court elected to establish rules that bar contribution or make contribution unnecessary. *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993) (a settlement in good faith bars claims for contribution); *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993) (contribution not necessary because settlement extinguishes proportional fault of settling defendant).

In *Leger v. Drilling Well Control Inc.*, 592 F.2d 1246 (5th Cir. 1979) (hereafter "*Leger*"), the court, relying upon the decision in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed 2d 251 (1975), held that a

settlement between the plaintiff and one of several defendants operated to extinguish the proportional liability of the settling defendant. The effect of this approach is to make contribution against a settling defendant unnecessary because the remaining defendants are liable to the plaintiff only for the harm caused by their collective fault. This approach also has the added benefit of making it unnecessary for a court to expend time determining whether a settlement is made in good faith. The *Leger* rule was applied by the Eighth Circuit Court of Appeals in *Associated Electric Cooperative, Inc. v. Mid-America Transportation Company*, 931 F.2d 1266 (8th Cir. 1991). The Alabama Supreme Court has similarly elected to adopt the *Leger* approach and expressly rejected the analysis and holding of the Eleventh Circuit Court of Appeals in *Great Lakes*. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993).

The decisions in *Great Lakes* and *Polackwich* stand alone. These decisions are contrary to the reasoned authority in those circuits in which the effect of settlement on contribution has been considered. *Great Lakes* and *Polackwich* are disruptive of the necessary principle requiring uniformity in the application of maritime law. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed 2d 368 (1958). Indeed, the decision in *Great Lakes* has led to direct conflict between the maritime law applied by the Eleventh Circuit Court of Appeals and the maritime law as applied in maritime cases in the State of Alabama. *Amerada Hess, supra*. It is not unlikely that the courts in other states within the eleventh circuit will reject the flawed analysis and decision in *Great Lakes*.

In considering the effect settlement is to have on claims for contribution, courts frequently start their analysis by looking at the "three possible solutions" set forth in comment m to section 886A, Restatement (Second) of Torts; the choices are:

1. Settlement has no effect upon claims for contribution. Such claims may be prosecuted by non-settling defendants against the settling tortfeasor. The Eleventh Circuit Court of Appeals is the only proponent of this solution. *Great Lakes; Polackwich.*

2. Settlement extinguishes claims for contribution. *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989) and *Rufolo v. Midwest Marine Contractor, Inc.,* No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993) adopt this position.

3. Settlement reduces the plaintiff's claim by the percentage of fault of the settling tortfeasor and thus makes contribution unnecessary. *Leger v. Drilling Well Control, Inc.,* 592 F.2d 1246 (5th Cir. 1979), *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.,* 931 F.2d 1266 (8th Cir. 1991) and *Amerada Hess v. Owens-Corning Fiberglass Corporation,* 1993 AMC 2513 (Ala. 1993) follow this rule.

In *Miller v. Christopher,* 887 F.2d 902 (9th Cir. 1989), the court noted that it found "no federal admiralty decision that adopts the first approach . . . " 887 F.2d at 906. Unfortunately, there are now two; namely, *Great Lakes* and *Polackwich.* As the court in *Miller v. Christopher* noted "[d]enial of a settlement bar would interfere with policies favoring settlement". 887 F.2d at 906. So far as Boca Grande Club is aware, no maritime cases other than *Great*

Lakes and *Polackwich* stand for the proposition that a settling defendant remains liable for contribution.

The solution to the problem selected by the court in *Great Lakes* and implemented in *Polackwich* has been tried and failed. The 1939 draft of the Uniform Contribution Among Tort Feasors Act adopted the solution selected by *Great Lakes;* i.e. that settlement does not affect contribution rights. However, because of "unsatisfactory" results with this approach the uniform act had to be changed. *Miller v. Christopher,* 887 F.2d at 905.

In 1955 the uniform act was revised. The first approach, the *Great Lakes/Polackwich* approach, was rejected and in its place was adopted the rule that settlement bars contribution claims. § 4(b) Uniform Contribution Among Tort Feasors Act, 12 U.L.A. 98 (1975). The comment to this section notes:

> No defendant wants to settle when he remains open to contribution in an uncertain amount, to be determined on the basis of a judgment against another in a suit to which he will not be a party. Some reports go so far as to say that the 1939 Act has made independent settlements impossible. Many of the complaints come from plaintiff's attorneys, who say that they can no longer settle cases with one tortfeasor.
>
> * * *
>
> It seems more important not to discourage settlements than to make an attempt of doubtful effectiveness to prevent discrimination by plaintiffs, or collusion in the suit. Accordingly, the subsection provides that the release in good faith discharges the tortfeasor outright from all

liability for contribution. 12 U.L.A. 99-100 (1975), *Miller v. Christopher*, 887 F.2d at 907.

Preservation of settlement as a viable means of terminating maritime litigation was a fundamental concern of the Seventh Circuit Court of Appeals in *Rufolo v. Midwest Marine Contractor, Inc.*, where the court, in adopting a settlement bar rule, held:

> We are at liberty, therefore, to choose any of these contribution systems and we opt for the settlement bar. Its advantages are obvious: parties can buy certainty. If they work out a deal sufficiently appealing to the plaintiff, defendants can evade the hazards of trial and the pitfalls of post-trial contribution. There is thus a huge incentive to settle cases. We are mindful that courts should not shirk their duty to decide genuine issues and controversies by tipping the scales so heavily in favor of settling that it never pays to adjudicate, but considering how clogged the court system is and how bulging the federal reporters have become, it is appropriate to encourage parties to negotiate their own solutions. 1993 WL 382496 at *3.

Non-maritime law also precludes contribution following settlement. The majority of the states protect settling tortfeasors from contribution claims by non-settling defendants.

Arizona, Arkansas, Colorado, Delaware, Florida, Hawaii, Maryland, Massachusetts, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota and Tennessee have enacted the Uniform Contribution Among Tortfeasors Act. 12 U.L.A. (1993 Supp. at 81).

Section 4 of that Act provides that a release given by a plaintiff to a settling tortfeasor discharges the settling party from liability for contribution to any other tortfeasor. 12 U.L.A. 98 (1975).

Iowa and Washington have adopted the Uniform Comparative Fault Act. 12 U.L.A. (1993 Supp. at 43). Section 6 of the Uniform Comparative Fault Act operates to discharge a settling defendant from all claims for contribution; this section, consistent with *Leger*, extinguishes the settling tortfeasor's share of the total liability. 12 U.L.A. (1993 Supp. at 57).

Nine other States have enacted other legislation that provides protection to settling defendants from contribution claims. See West's Ann. Cal. C.C.P. §§ 877, 877.6; Conn. Gen. Stat. Ann. § 52-57 2h(h)(2)(n); Idaho Code § 6-806; Ill. Comp. Stat. Ann. 100/2, § 2(d); Mich. Cont. L.Ann. § 600.2925d(c); Vernon's Ann. Mo. Stat. § 57.060; McKinney's Con. L. N.Y. Ann. § 15-108(b); Vernon's Tex. Stat. and C. Ann. § 33.015(d); Code of Va. § 801-35.1-A.2.

The weight of respectable authority favors a rule that permits a settling defendant to close his file and be free of claims for contribution.

II

IN REJECTING A SETTLEMENT BAR RULE THE *GREAT LAKES* COURT MISREAD *EDMONDS*

The *Great Lakes* case arose out of a collision between a tank ship and a barge and dredge moored together. The collision occurred in 1975 on the St. John's River a short

distance from the port of Jacksonville. *Great Lakes* represented the third time the case came before the court of appeals. The initial appearance of the case was in *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982), where the court reviewed a judgment entered on the basis of a jury verdict finding that although the employer of the injured seamen was negligent, the negligence did not contribute to their damages. The verdict also allocated 100% of the fault for the collision to the tank ship, although neither the tank ship nor its owner was a party to the lawsuit. Thus, the injured seamen recovered nothing because, even though their employer was negligent, the jury found that the sole cause of their injuries was the fault of an absent party, the owner of the tank ship who had settled with the seamen. The court of appeals was therefore presented for review the first of what proved to be three unpalatable trial court decisions.

In *Ebanks* the seamen's employer sought to uphold the verdict in its favor by arguing that *Leger* sanctioned the allocation of fault between the participants in the collision even though one of those parties was not present at trial. As a means of circumventing the comparative fault concept entrenched in *Leger*, the seamen argued that the decision in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed 2d 521 (1979), reaffirmed the proposition that maritime plaintiffs enjoyed the benefit of joint and several liability and, accordingly, that *Edmonds* required that the judgment be reversed. The court of appeals accepted the argument and held that *Leger* did not apply in face of *Edmonds*, saying "[w]e also agree that if the mere language of the *Leger* case could be construed to authorize the proceedings

conducted here by the trial court, then its effect as precedent has been weakened by *Edmonds*." 688 F.2d at 720. The court proceeded to reverse the judgment and sent the case back to the trial court.

Five years later the case was back before the Eleventh Circuit Court of Appeals as *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed 2d 604 (1988). *Self* involved the claim of the widow of a seaman employed on the dredge who was killed as a result of the collision. At trial the court determined that the collision was 70% the fault of the owner of the tank ship and 30% the fault of the seaman's employer, the dredge owner. But, before the trial, the widow settled with the owner of the tank ship who was ultimately found to be 70% at fault. At trial the total of plaintiff's damages was ascertained but, upon the basis of *Leger*, judgment was entered for only 30% of that total. The widow had made a bad bargain which the court of appeals proceeded to rectify. The court first pointed to its earlier decision in *Ebanks* where it had held that *Leger* had "been weakened by *Edmonds*." 688 F.2d at 720. The court then determined that "[b]ecause of these distinctions, namely the change in the law by *Edmonds* and *Ebanks*, and the differences in the facts, we do not consider *Leger* as controlling our opinion in this case." 832 F.2d at 1547. The court held that the widow was entitled to recover full damages from the owner of the dredge less the amount paid in settlement by the owner of the tank ship. 832 F.2d at 1548. Thus, the court of appeals effectively elected the *pro tanto*/contribution bar rule. 832 F.2d at 1547-48. The court also pointed out that

the difficult facts in the case made its "decision compelling." 832 F.2d at 1548, n.5.

In 1992 the case made its third trip to the court of appeals in *Great Lakes*. The district court, on the basis of the decision in *Self*, granted summary judgment in favor of the settling tank ship owner on the contribution claim of the dredge owner. *Great Lakes Dredge & Dock Co. v. Tanker*, 1990 AMC 2247 (M.D. Fla. 1990). After the second appeal the dredge owner settled with the widow Self for something in excess of two million dollars and was interested in obtaining a sizable contribution from the tank ship owner who had been found 70% at fault for the collision. Thus, the court of appeals was squarely faced with the contribution issue in a third unhappy factual context; i.e. the party 30% at fault had paid most of the damages but was barred from contribution against the settling tortfeasor who was 70% at fault. To alleviate the predicament of the unhappy dredge owner, the court of appeals ruled that what it had said in *Self* about a settlement bar rule was *dicta*. The court reversed the judgment below and held that in maritime cases in the eleventh circuit an action for contribution may be maintained against a settling tortfeasor. 957 F.2d at 1582-83.

Ebanks, *Self* and *Great Lakes* are perfect examples of the adage that hard cases make bad law. *Edmonds* was used to circumvent *Leger* in order to achieve a "compelling" result. *Edmonds* should have been, and should be, limited to its facts; namely, to cases involving a statutory bar against a party such as the employer of longshoremen. *Associated Electric Cooperative, Inc. v. Mid-America Transportation Co.*, 931 F.2d 1266, 1270-71 (8th Cir. 1991). In *Reliable*, this Court brought the maritime law of the

United States into harmony with the law of other maritime nations by adopting comparative fault. Since this Court's decision in *Reliable*, the concept of comparative fault has rapidly expanded and is fast becoming the law of the land. It is therefore illogical to read *Edmonds* as limiting *Reliable* or to use *Edmonds* to circumvent or discredit *Leger*, which is a perfect example of the implementation of the comparative fault rule laid down by this Court.

Edmonds did not weaken *Leger*. *Leger* did not do any damage to the concept of joint and several liability. Furthermore, *Edmonds* was essentially a restatement, following the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905, of the proposition that the Act limited an employer's liability. See *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 72 S.Ct. 277, 96 L.Ed 318 (1952).

Great Lakes and *Polackwich* must be reversed and replaced by a settlement bar rule. Otherwise, settlement will no longer be available to terminate multiple-party maritime lawsuits in the eleventh circuit. For the reasons mentioned in Point III, *infra*, the *Leger* rule is preferable. However, the *pro tanto*/settlement bar rule is also workable. Adoption of either rule will permit Boca Grande Club, as a settling tortfeasor, to obtain the benefits intended by its settlement and to close its file in this case.

III

A SETTLEMENT BAR RULE DOES NOT VIOLATE FUNDAMENTAL PRINCIPLES OF ADMIRALTY LAW

In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 94 S.Ct. 2174, 40 L.Ed 2d 694 (1974) (hereinafter *"Cooper"*), this Court acknowledged the right of contribution between joint tortfeasors in maritime cases. In *United States v. Reliable Transfer Co. Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed 2d 251 (1975) (hereinafter *"Reliable"*), the Court established the principle of comparative fault in collision cases, noting that comparative fault had applied for many years in maritime personal injury actions. And in *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S.Ct. 2753, 61 L.Ed 2d 521 (1979) (hereinafter *"Edmonds"*) the Court held that the concept of joint and several liability applies in maritime cases. By these decisions comparative fault, joint and several liability, and contribution among joint tortfeasors became established in the maritime law of the United States.

A rule that affords protection to a settling defendant from claims for contribution must take these concepts into account and also give effect to other basic legal tenets; namely, settlement and the efficient utilization of judicial resources. The law favors the "just, speedy, and inexpensive determination of every action." Rule 1, Federal Rules of Civil Procedure. The law favors settlement. *Marek v. Chesny*, 473 U.S. 1, 105 S.Ct. 3012, 87 L.Ed 2d 1 (1985); *Delta Air Lines Inc. v. August*, 450 U.S. 346, 101 S.Ct. 1146, 67 L.Ed 2d 287 (1981) (Powell, J. concurring):

> "On the other hand, parties to litigation and the public as a whole have an interest – often an overriding one – in settlement rather than

> exhaustion of protracted court proceedings." 450 U.S. at 363.

"The policy of the law encourages compromise to avoid the uncertainties of the outcome of litigation as well as the avoidance of wasteful litigation and expense incident thereto." *Pfizer Inc. v. Lord*, 456 F.2d 532, 543 (8th Cir. 1972), *cert. denied*, 406 U.S. 976, 92 S.Ct. 2411, 32 L.Ed 2d 676 (1972).

The rule adopted in *Great Lakes* and applied in *Polackwich* does not encourage settlement – it inhibits it. Rather than promoting efficient utilization of judicial resources and the inexpensive determination of lawsuits, *Great Lakes* promotes litigation. The rule contemplates that at some stage of the lawsuit the settling tortfeasor (if hereafter there ever is one) must come back to court so it may be determined if he shall pay more to the other defendants. Furthermore, the conflict created by the *Great Lakes* decision is intolerable, *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993), and the decision should not be permitted to stand.

Comparative fault, joint and several liability and contribution can be adequately accommodated while protecting a settling tortfeasor from contribution claims. The best solution is the rule crafted by the Fifth Circuit Court of Appeals in *Leger*.

Under *Leger* the settling tortfeasor's share of the total liability is extinguished in conformity with *Reliable*. The plaintiff continues the action against the remaining defendants and may recover from them jointly and severally as authorized by *Edmonds*, and those defendants have, as

between themselves, the right of contribution authorized by *Cooper*.

The *pro tanto* setoff/settlement bar rule applied by the courts in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989), and *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496 (7th Cir. Sept. 29, 1993), is a workable solution. Under this approach the dollar amount of the settlement is deducted from the plaintiff's total claim leaving plaintiff to pursue the remaining tortfeasors jointly and severally for the balance. As between the remaining defendants there is the right of contribution. However, the settling defendant is free of the case and all claims for contribution against him are extinguished. This solution does run afoul of *Reliable* to the extent that the *pro tanto* setoff may be greater or less than the actual proportionate fault of the settling tortfeasor depending upon whether plaintiff made a good or bad settlement. Otherwise this approach preserves a plaintiff's *Edmonds* mandated right of joint and several liability as to the remaining defendants as well as the defendants' *Cooper* created right of contribution between themselves. Furthermore, the allocation of fault between the remaining defendants on the contribution claims will be undertaken in accordance with the comparative fault principles as required by *Reliable*. This approach also fosters the efficient resolution of disputes by permitting a defendant to terminate its liability with a plaintiff and escape the litigation. The single drawback to the *pro tanto* approach is its lack of symmetry; i.e., the amount paid to extinguish the liability of the settling party is likely to be either more or less than that defendant's proportional share of the total liability. The *pro tanto* approach appears

to be used by courts that are concerned that a plaintiff may make a bad bargain with a settling defendant. However, it is submitted that this overly solicitous attitude toward plaintiffs is probably outdated. More often than not, when time for settlement discussion comes around, the plaintiff and his lawyers have a pretty fair idea as to which among the various defendants are the more culpable. The more enlightened approach ought to be to hold the plaintiff to his bargain and extinguish that portion of the total liability represented by the proportional fault of the settling defendant. *Amerada Hess Corporation v. Owens-Corning Fiberglass Corporation*, 1993 AMC 2513 (Ala. 1993).

Either rule promotes settlement and the economical use of judicial resources. Neither rule violates basic precepts of admiralty law.

IV

A SETTLEMENT BAR RULE SHOULD REQUIRE NO JUDICIAL OVERSIGHT

Boca Grande Club submits that, ideally, a properly functioning settlement bar rule should be self-operative. If settlement operates as a bar to contribution claims only after the settlement has been judicially sanctioned as being in good faith the attractiveness of settlement is diminished. This practical fact was most recently recognized in the concurring opinion in *Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, 1993 WL 382496, at *8 (7th Cir. Sept. 29, 1993), where Judge Eisele wrote "[a] mini-trial concerning the merits of the settlement will usually be required to determine whether the liability

assumed by the settling tortfeasor is reasonably related to the strength of the plaintiff's claims."

The criticism of a good faith condition by the court in *In Re The Glacier Bay*, was harsher:

> "In cases such as this, where there are large sums of money at risk, a good faith hearing would not be merely an affidavit-type of proceeding, but a not-so-mini-trial. A good faith hearing is simply neither an effective nor efficient use of judicial resources." 1993 AMC at 1536.

Miller v. Christopher, 887 F.2d 902 (9th Cir. 1989) is a perfect example of the continued expenditure of judicial resources generated by a good faith condition. One of the issues in the appeal in *Miller* was whether the district court was correct in finding the settlement in that case to have been undertaken in good faith. A party that settles wants to avoid all further judicial entanglement and most certainly does not want to be involved in an appeal to determine if his settlement is to be given effect.

Decisions in non-maritime cases have also criticized co..ditioning contribution on a good faith condition. In *Franklin v. Kaypro Corporation*, 884 F.2d 1222, 1230 (9th Cir. 1989), *cert. denied*, 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed 2d 192 (1990), the court of appeals noted:

> "In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement."

In *Donovan v. Robbins*, 752 F.2d 1170, 1181, (7th Cir. 1985) the court noted that an inquiry into whether a settlement

is fair "means bogging down the settlement process in a miniature trial before trial, . . . "

As the concurring opinion in *Rufolo* points out, application of *Leger* avoids all of the practical difficulties attendant upon an inquiry as to whether a settlement is in good faith. Because application of the *Leger* principle extinguishes the proportional fault of the settling defendant, the remaining defendants need not be concerned about good faith because they will be liable only for their own collective fault and not for any of the fault of the settling defendant.

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should adopt for application in this case and future maritime cases a rule that settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by non-settling tortfeasors against the settling tortfeasor.

Respectfully submitted,

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
P.O. Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
P. O. Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner

No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENT'S BRIEF ON THE MERITS

STUART C. MARKMAN
(Counsel of Record)
JAMES E. FELMAN
KYNES & MARKMAN, P.A.
100 S. Ashley Drive,
Suite 1300
Post Office Box 3396
Tampa, FL 33601-3396
(813) 229-1118

and

C. STEVEN YERRID
CHRISTOPHER S. KNOPIK
YERRID, KNOPIK & VALENZUELA
101 E. Kennedy Blvd.
Suite 2160
Tampa, FL 33602
(813) 222-8222

Attorneys for Florida Power & Light Company, Inc., Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

When some but not all defendants settle with a plaintiff in a maritime tort action, should a non-settling defendant who has paid an amount of damages that exceeds its equitable share be permitted to seek contribution from a settling defendant who has paid less than its equitable share?

LIST OF PARTIES

Respondent Florida Power & Light Company's parent company is FPL Group, Inc. Florida Power & Light Company has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This case arises out of a maritime accident involving a sailboat owned by Petitioner Boca Grande Club, Inc. ("Boca Grande"). Boca Grande leased its sailboat to two recreational sailors, Robert Polackwich and Jonathan Richards. While Polackwich and Richards were operating the sailboat, its mast came into contact with an overhead power line owned and maintained by Respondent Florida Power & Light Company ("FP&L"). As a result of this contact, both Polackwich and Richards were killed.

The estates of Polackwich and Richards sued FP&L in Florida state court for wrongful death. FP&L in turn brought a third party action in state court against Boca Grande for contribution and indemnity. In response, Boca Grande instituted the instant federal action for limitation of or exoneration from liability. JA 5. In its answer to the federal limitation complaint, FP&L reasserted its claim against Boca Grande for contribution. JA 14-15.

FP&L's contribution claim stated Boca Grande's negligence was "in whole or in part" the cause of the decedent's deaths. FP&L contended Boca Grande neither instructed the decedents regarding the safe operation of the rented sailboat nor determined whether the decedents were qualified to operate it in the first place. In addition, FP&L alleged Boca Grande negligently failed to warn or stop the decedents as they sailed away from the club in the direction of the overhead power line, which Boca Grande knew to be dangerous. Finally, FP&L claimed the sailboat Boca Grande rented the decedents was unseaworthy because it was neither equipped with a mast that would not conduct electricity nor one which

could be easily and rapidly lowered, notwithstanding Boca Grande's knowledge of the dangerous overhead power line. JA 11-15; R4-109-6-11.

Boca Grande eventually settled with the plaintiffs for $225,000.00. JA 37-39; R6-178-13. After settling, Boca Grande took the position that its settlement should act as a bar to FP&L's claim for contribution. It filed a motion for summary judgment in the federal limitation action based on a variation of the so-called "settlement bar rule." JA 51-62. Boca Grande claimed its settlement with the plaintiffs eliminated any possibility that it might have to pay a claim for contribution to FP&L or to any other defendant who would ultimately be required to pay a judgment for more than its equitable or proportionate share of the plaintiff's damages. JA 53-55. Under the version of the settlement bar rule it advocated, Boca Grande took the position that its settlement did not have to be in "good faith," a condition imposed by courts to guard against collusion among the settling parties and unfairness to other joint tortfeasors. JA 55-61.

A. The District Court's Order

The district court adopted the version of the settlement bar rule Boca Grande proposed and granted the motion for summary judgment. JA 88-90. It held Boca Grande's settlement with the decedents constituted an absolute bar to FP&L's action for contribution, and specifically rejected the imposition of any condition that Boca

Grande's settlement with the plaintiffs had to be non-collusive and in good faith. JA 88-90.[1]

B. The Eleventh Circuit's Decision

After summary judgment was entered, the settlement bar rule urged by Boca Grande and applied by the district court was rejected by the Eleventh Circuit in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 484, 121 L.Ed.2d 388 (1992). In *Great Lakes*, the Eleventh Circuit held an action for contribution against a settling maritime defendant may be maintained by a non-settling defendant that has paid more than its share of the plaintiff's damages according to the respective degrees of fault. *Id.* at 1582-83. Based on *Great Lakes*, the Eleventh Circuit vacated the instant summary judgment and remanded the case for resolution of FP&L's contribution claim against Boca Grande. *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir.), *cert. granted*, ___ U.S. ___, 114 S.Ct. 39, 125 L.Ed.2d 788 (1993).

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[1] After the wrongful death claims were settled and dismissed from the limitation case, those actions were tried in state court solely against FP&L. They resulted in jury verdicts in favor of the plaintiffs in the total amount of approximately $8.7 million, plus prejudgment interest. The verdict was reduced, however, based on the jury's finding that the decedents were collectively 35% at fault for the collision and FP&L was 65% at fault. (Because this case was tried in state court, these facts are not a part of the instant record and are included by agreement with Boca Grande).

SUMMARY OF ARGUMENT

When a plaintiff in a multi-defendant maritime tort action settles with one defendant, the courts have employed three different methods to account for the settlement in determining the amount of damages that must be paid by the non-settling defendant. Under the approach the Eleventh Circuit followed here, a non-settling defendant who pays damages in excess of its equitable share has a right to seek contribution from a settling defendant who paid less than its fair share. Other courts have corrected the inequity by using the "proportionate credit rule." Under this rule, a non-settling defendant's liability is reduced according to the percentage of damages that equals the settling defendant's proportionate fault. Still other courts, like the district court here, follow the "settlement bar rule." Unlike the first two methods, the settlement bar rule is not designed to eliminate overpayment and insure the non-settling defendant is held responsible only for the portion of the plaintiff's damages it caused. Instead, a non-settling defendant is given a dollar-for-dollar (pro tanto) credit limited to the amount of the settlement, even if the settling defendant has underpaid and the non-settling defendant is left with a bill for damages that far exceeds its true proportionate fault.

Of the three methods, only the contribution and proportionate credit rules are consistent with the controlling principles of maritime law. By holding parties liable for the amount of damages actually attributable to their own conduct, these two rules further the maritime law goals of a more equal distribution of justice and deterrence of negligence. The settlement bar rule, on the other hand, is at odds with these principles. It gives the plaintiff an incentive to settle quickly and cheaply with a less wealthy defendant

irrespective of comparative fault. Such disproportionate settlements are encouraged because the plaintiff knows that even if it settles for too little, it can still go to trial against the deep pocket and recover at least one hundred percent of its damages, even if the remaining defendant is as little as one percent to blame. The result is that the non-settling defendant is forced to bear a disproportionately large amount of the plaintiff's damages, not because of the defendants' relative *culpability* but instead because of the defendants' relative *solvency*.

The one supposed advantage to the settlement bar rule – that it promotes settlements – is an illusion. The rule does promote *partial* settlements. But the plaintiff's knowledge that it need only establish the deep pocket defendant is one percent at fault to recover the entire judgment encourages the plaintiff to go to trail against the remaining defendant. It therefore discourages the sort of comprehensive, full settlements that truly further the goal of judicial economy.

In addition, the partial settlements the settlement bar rule promotes are often unfair. The deep pocket defendant, who was completely shut out of the settlement process, is ultimately forced to overpay when, as the settlement bar rule encourages, the settling defendant pays less than its fair share.

The contribution rule and the proportionate credit rule do not suffer from these defects. They are consistent with maritime law and the policies of equal distribution of justice and safety that underlie it. Either one should be adopted, and the settlement bar rule should be rejected.

ARGUMENT

Boca Grande contends that when a plaintiff in a maritime tort action settles with some but not all defendants, a non-settling defendant that has paid an amount of damages that exceeds its equitable share should not be permitted to seek contribution from a settling defendant who has paid less than its equitable share. Instead, Boca Grande argues, the *best* way to account for a plaintiff's settlement with one defendant prior to judgment is to reduce the judgment in accordance with the settling defendant's proportion of fault. The second best way to resolve the situation, Boca Grande urges, is to bar the non-settling defendant who has overpaid from seeking contribution from the settling defendant who has underpaid.

Of the generally recognized alternatives for handling partial settlements in multi-defendant maritime tort actions, only Boca Grande's first choice, the proportionate credit rule, and the contribution rule the Eleventh Circuit applied below can withstand scrutiny under controlling maritime law and policy. Boca Grande's second choice, the settlement bar rule, conflicts with maritime law and policy and the Supreme Court should discard it.

WHEN SOME BUT NOT ALL DEFENDANTS SETTLE WITH A PLAINTIFF IN A MARITIME TORT ACTION, A NON-SETTLING DEFENDANT WHO HAS PAID AN AMOUNT OF DAMAGES THAT EXCEEDS ITS EQUITABLE SHARE SHOULD BE PERMITTED TO SEEK CONTRIBUTION FROM A SETTLING DEFENDANT WHO HAS PAID LESS THAN ITS EQUITABLE SHARE.

As Boca Grande points out, the authorities discuss three different methods or approaches for dealing with

contribution in the context of partial settlements in multi-defendant maritime tort cases.[2] They are:

(1) The contribution rule, under which the plaintiff's claim against the non-settling defendant is reduced using a "pro tanto" or dollar for dollar setoff and a non-settling defendant that pays more than its apportioned share of liability is allowed to seek contribution from the settling defendant. This is the rule the Eleventh Circuit adopted in *Great Lakes*, 957 F.2d at 1581-83, and followed here. *Boca Grande*, 990 F.2d at 607.

(2) The settlement bar rule, under which the plaintiff's claim against the non-settling defendant is reduced by a pro tanto set off and an action for contribution against the settling defendant is prohibited, usually in conjunction with the requirement that the settlement be in "good faith." Boca Grande urged and the district court adopted this rule, but *without* imposing the usual good faith requirement. The Eleventh Circuit rejected the settlement bar rule in *Great Lakes*.

(3) The proportionate credit rule,[3] under which the plaintiff's claim against the non-settling

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[2] *See Great Lakes*, 957 F.2d at 1581; *Miller v. Christopher*, 887 F.2d 902, 905 (9th Cir. 1989); Restatement (Second) of Torts § 886A comment m (1977). *See also* L. Kornhauser & R. Revesz, *Settlement Under Joint and Several Liability* (Rev. Draft Nov. 10, 1993) (publication forthcoming).

[3] The Eleventh Circuit refers to this approach as a *"pro rata"* reduction. *Great Lakes*, 957 F.2d at 1581. To avoid confusion with a pro rata credit that has a different meaning, this brief refers to this method as the "proportionate credit" rule.

> defendant is reduced by the amount of the settling defendant's proportionate share of damages. Because the non-settling defendant receives a credit for the portion of the plaintiff's damages caused by the fault of the settling defendant, this method eliminates any reason for the non-settling defendant to sue the settling defendant for contribution. The United States, the Maritime Law Association, and now Boca Grande all support this approach. In *Great Lakes*, the Eleventh Circuit did not disapprove this rule but instead deemed it an unavailable option based on circuit precedent. 957 F.2d at 1580 n.4.

Because there is no action for contribution under either alternative, Boca Grande takes the position that it "would be satisfied" with either the version of the settlement bar rule it supported below or the proportionate credit rule.[4] Pet. Br. at 5. As noted, Boca Grande's first choice is the latter, which it describes as "preferable," "more efficient," and "more workable." Pet. Br. at 5, 7, 17.

That Boca Grande supports any rule that will conclude its involvement in this matter based on the relatively small amount it paid in settlement is understandable. But the rule this Court adopts should comport

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[4] Boca Grande labels both approaches "settlement bar rules." This is somewhat inaccurate. The method Boca Grande urged below is a true settlement bar rule because it "bars" a non-settling defendant from seeking contribution. The proportionate credit rule, on the other hand, does not actually bar contribution, but instead eliminates the necessity for it by giving non-settling defendants a credit for the portion of the plaintiff's damages caused by the settling defendants.

with settled principles and policies of maritime law. Because it conflicts with those principles, Boca Grande's second choice – the settlement bar rule – should be rejected. The Supreme Court should either affirm the Eleventh Circuit and permit contribution or adopt the proportionate credit rule.

A. The settlement bar rule is inconsistent with federal maritime law and the policies underlying it.

Conceding it is less "workable" and "efficient" than the proportionate credit rule, and that it "does run afoul of" *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), Boca Grande nevertheless maintains its second choice, the settlement bar rule, should be adopted over the Eleventh Circuit's contribution rule. Pet. Br. at 7, 20. For at least two reasons, Boca Grande is wrong and the settlement bar rule should be rejected.

1. The settlement bar rule conflicts with the principles of more equal distribution of justice and safety.

Equal and just allocation of liability and encouragement of safety and deterrence of negligence are cornerstone principles of maritime law. In *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106, 113 (1974), the Supreme Court reaffirmed the "well-established maritime rule allowing contribution between joint tortfeasors" and rejected the common law rule of no contribution. In reaching this conclusion, *Cooper Stevedoring* identified the core principles underlying maritime contribution as (1) a

more equal distribution of justice and (2) safety or deterrence. 417 U.S. at 111.[5] One year later, in *Reliable Transfer*, the Supreme Court focused again on the principle of a more equal distribution of justice and rejected the old "palpably unfair" rule of equally divided damages in favor of apportionment of damages according to comparative degrees of causative fault. 421 U.S. at 405, 408.[6]

Unlike the Eleventh Circuit's contribution rule, the settlement bar rule Boca Grande supports cannot be squared with *Cooper Stevedoring* and *Reliable Transfer*. Permitting contribution insures liability will be shared by all joint tortfeasors in proportion to their respective degrees of fault. *Great Lakes*, 957 F.2d at 1581. The settlement bar

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[5] The Supreme Court stated:

> Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. . . . Indeed, it is fair to say that application of the rule of division of damages between joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." And a "more equal distribution of justice" can best be achieved by ameliorating the common law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame.

417 U.S. at 110-11 (citations omitted).

[6] *Reliable Transfer* emphasized the goal of "just and equitable" allocation of damages, and stated "that goal can be more nearly realized by a standard that allocates damages according to comparative fault whenever possible." 421 U.S. at 411.

rule, however, violates the principles of "more equal distribution of justice" and "just and equitable" allocation of damages. As the Eleventh Circuit observed in *Great Lakes*, the settlement bar rule makes it possible for a non-settling defendant to be forced to bear a disproportionately greater amount of the plaintiff's damages, far in excess of culpability, merely because the plaintiff decides to settle with a different defendant for less than its fair share. 957 F.2d at 1582.[7]

The settlement bar rule also conflicts with the maritime law goal of encouraging safety and deterring negligence. Contribution guarantees an efficient level of deterrence against future negligence because each party is required to bear that portion of the damages caused by its own negligence. *Great Lakes*, 957 F.2d at 1582; *see also Reliable Transfer*, 421 U.S. at 405 n.11 (comparative fault "imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others"). By contrast, under the settlement bar rule, a maritime defendant can avoid the true measure of its liability by making a quick and cheap settlement, which negates the deterrent effect of comparative fault.

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[7] Although the United States and the Maritime Law Association favor the proportionate credit approach, they agree that between the remaining options – contribution and settlement bar – the former is preferred and the latter should be rejected as unfair and contrary to the Supreme Court precedent.

2. The settlement bar rule does not encourage full, efficient, and fair settlements.

Boca Grande does not seriously dispute that at least as compared to the Eleventh Circuit's contribution rule, the settlement bar rule does not promote either the principle of a more equal distribution of justice or the principle of safety and deterrence. Instead, Boca Grande's only real criticism of the contribution rule and the only advantage it claims for the settlement bar rule involves settlement. The settlement bar rule better promotes settlement, Boca Grande's argument runs, because a defendant will not settle unless it knows it will be free of contribution claims by non-settling defendants.

Boca Grande's analysis is short-sighted and inaccurate. The settlement bar rule does not create an incentive for comprehensive settlements that quickly and efficiently put an end to litigation. Instead, it works at cross purposes to this goal by encouraging only partial settlements with the result that litigation continues but on a fragmented and piecemeal basis. The problem is exacerbated because the settlement bar rule promotes unfairness and collusion in the partial settlements it encourages.

a. The settlement bar rule does not encourage full and efficient settlements.

Contrary to Boca Grande's claim, the settlement bar rule promotes quick but only partial and often unjust settlements, ultimately *delaying* resolution of the entire case. Under the settlement bar rule, the plaintiff has the

power to target a deep pocket while insulating the settling defendant from contribution, even though the settling defendant may be far more culpable. When a plaintiff settles with a defendant, there will often be little or no incentive for the plaintiff to settle with the remaining one. The plaintiff knows it need only establish one percent of fault on the part of the remaining defendant to recover the entire judgment. *See Great Lakes*, 957 F.2d at 1582. For this reason, the settlement bar rule actually diminishes the possibility of a reasonable global settlement and encourages a trial. Thus, while the settlement bar rule encourages *partial* settlements, it may also have the ultimate effect of prolonging, not shortening, litigation. *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1576 (D.S.C. 1991).

Boca Grande's relative culpability is not yet known.[8] The five year history of the instant litigation strongly suggests, however, that application of the settlement bar rule has guided this case into the above counterproductive pattern. Three years ago, the plaintiffs agreed to settle with Boca Grande for $225,000. With this $225,000 war chest, the plaintiffs went to trial solely against FP&L, safe in the knowledge that they needed only to establish one percent of fault on FP&L's part to recover the entire

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[8] Boca Grande's fault was not determined in the federal limitation action because the district court applied the settlement bar rule. It was not determined in the state trial either, because over FP&L's objection, the trial judge refused to follow the proportionate credit rule. (The latter fact is not a part of the instant record and is included by agreement with Boca Grande).

judgment. After a lengthy state trial, the plaintiffs eventually won an $8.7 million gross verdict. Boca Grande's settlement is only 2½% of this amount.

The point is that the settlement bar rule is inefficient because it disrupts the normal balance of settlement risks. In this case, there is a strong suggestion that Boca Grande's early and relatively cheap settlement made it less likely, not more likely, that this *entire* case would be resolved short of the full trial and the pending federal and state appeals that have followed. The result is that FP&L, the one party who had no involvement in the settlement decision in the first place, has been saddled with the risk that the plaintiffs settled with Boca Grande for far too little. *See Great Lakes*, 957 F.2d at 1582. Contrary to the advantage of efficiency Boca Grande claims, application of the settlement bar rule in the instant case evidently did nothing to encourage a meaningful settlement that would promote true judicial economy.[9]

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[9] Against this background, the efficiency gain Boca Grande claims if the settlement bar rule is applied *without* a good faith condition, Pet. Br. at 21-23, is at the most *de minimus*. Further, not even one of the cases Boca Grande cites to criticize the good faith requirement actually advocates or employs a settlement bar rule without it. Even The National Association of Securities and Commercial Law Attorneys ("NASCAT"), a staunch proponent of the settlement bar rule, concedes the rule cannot be applied without a good faith condition, and the sort of good faith hearing both Boca Grande's authorities and NASCAT concede would be needed to assure fairness bears a striking resemblance to a full trial on the merits, or at least a "not-so-mini-trial." Pet. Br. at 21-23; NASCAT Br. at 12-13, 26 n.24.

In any event, it is by no means certain that the contribution rule will frustrate settlements. As the Eleventh Circuit observed, "the deterrent effect on settlements [if contribution is allowed] . . . is far from clearly established," particularly when contribution is compared with application of a settlement bar rule with a "conscientiously enforced" good-faith requirement. *Great Lakes*, 957 F.2d at 1582.

b. The settlement bar rule encourages unfair settlements.

Not only is the settlement bar rule inefficient in the long run, it is also unfair. As noted, the rule encourages the plaintiff to settle with the less affluent defendant and then combine with it to take advantage of the deep pocket defendant. The deep pocket defendant, who was excluded from the settlement process, will ultimately be forced to foot a disproportionate share of the bill if the partial settlement was for less than the settling defendant's proportionate share.

For this reason, even if contribution might deter the partial settlements the settlement bar rule promotes, the settlement bar rule should still be rejected. To the extent there is a tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail. The Supreme Court said as much in *Reliable Transfer*, when it abandoned the old rule of divided damages over the protest that comparative fault would discourage settlements. Declining to elevate bare efficiency above fairness, the Court refused to "continue the operation of an archaic rule because its facile application out of

court yields quick, though inequitable, settlements, and relieves the courts of some litigation." 421 U.S. at 408.[10] Instead, *Reliable Transfer* explained that "[e]xperience with comparative negligence in the personal injury area teaches that a rule of fairness in court will produce fair out-of-court settlements." *Id.*

Simply put, it is inherently unfair that the liability of a party such as FP&L should derive not from its own responsibility for the accident but rather from a private contractual arrangement made by others in which FP&L was not permitted to participate. The exposure of non-settling defendants to liability which exceeds their proportionate fault is an unfair allocation of risks and runs afoul of the principle of a more equal distribution of justice in *Cooper Stevedoring* and *Reliable Transfer*. It is also at odds with the goal of safety, because deterrence is not encouraged when a party knows its ultimate liability hinges not on its comparative culpability but instead on its comparative solvency, a factor over which it has no control.

The settlement bar rule conflicts with the core principles of just allocation of damages and safety. It promotes only partial settlements and does not enhance judicial economy or reduce the ultimate cost and complexity of multi-defendant maritime tort actions. As between the settlement bar rule and the contribution rule, the

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[10] *See also Donovan v. Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985) (recognizing the settlement bar rule may "encourage settlement all right, but it would be contrary to the spirit of contribution since it would allow guiltier defendants to get off cheaply by settling first").

Supreme Court should reject the former, adopt the latter, and affirm the Eleventh Circuit.

B. Like the contribution rule, the proportionate credit rule is consistent with maritime law and policy.

Should the Supreme Court decline to adopt the Eleventh Circuit's contribution rule, it should opt for the proportionate credit rule, the method Boca Grande actually prefers.[11] This alternative is also the first choice of the United States and the Maritime Law Association as amici curiae. Under the proportionate credit rule, the fact finder determines the proportionate fault of the defendants who have settled and an amount reflecting the settling defendants' proportionate share of liability is deducted from the judgment against the remaining defendants. *See, e.g., Associated Electric Coop., Inc. v. Mid-America Transp. Co.*, 931 F.2d 1266 (8th Cir. 1991); *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979).

Like the Eleventh Circuit's contribution rule, the proportionate credit rule is consistent with federal maritime

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[11] In its amicus brief, NASCAT suggests that because Boca Grande and FP&L agree the proportionate credit rule is a viable alternative, this case may fail to pose an actual case or controversy. NASCAT Br. at 16 n.10. NASCAT is wrong. While Boca Grande and FP&L agree conceptually on the advantages of the proportionate credit option, they are diametrically opposed with respect to the merits of the other two alternatives, contribution and settlement bar. As the parties do not desire "precisely the same result," Article III's case or controversy requirement is satisfied. *See GTE Sylvania, Inc. v. Consumers Union of United States, Inc.*, 445 U.S. 375, 383 (1980).

principles and policies. Both rules further the goal of a more equal distribution of justice by apportioning the liability of multiple wrongdoers according to comparative degrees of fault in keeping with *Reliable Transfer*, 421 U.S. at 411. In this regard, both rules prevent a non-settling defendant from paying more than its proportionate share of a plaintiff's damages. The contribution rule achieves this result by allowing defendants to divide up the bill on the basis of proportional fault after the plaintiff has been compensated. The proportionate credit method accomplishes the same thing by allowing the plaintiff to recover an amount reflecting the proportional fault of the non-settling defendant, no more and no less.

Likewise, both approaches encourage safety and deter negligence. Under both the Eleventh Circuit's contribution rule and the proportionate credit rule, deterrence is promoted because liability is focused on the party most responsible for the harm. *See, e.g., Reliable Transfer*, 421 U.S. at 405 n.11; *Cooper Stevedoring*, 417 U.S. at 110-11.

In addition to consistency with the controlling legal principles, the proportionate credit approach offers other advantages over the settlement bar rule. It is a fair method because it assures the parties to the settlement will receive the benefit of their bargain while at the same time each non-settling defendant is held responsible for the share of the plaintiff's damages it actually caused. More culpable defendants bear greater liability and less blameworthy ones bear less, without regard to the settling parties' bargains.

This fairness yields efficiency. As each defendant is responsible for only its proportionate share, non-settling defendants have no reason or need to seek contribution from settling defendants. For the same reason, non-settling defendants have no reason or need to question the good faith or reasonableness of the settlement between the plaintiff and other defendants in a good faith proceeding. As a result, the entire case is resolved in a single trial.

The proportionate credit approach offers the additional advantage that it will promote settlements on terms that are reasonable and fair to all concerned, plaintiffs and defendants alike.[12] As noted, under the settlement bar rule, a plaintiff is encouraged to enter into a partial settlement with a highly culpable but less wealthy defendant for an amount far less than the defendant's proportion of fault. The plaintiff will do so because it knows it will recover one hundred percent of its damages so long as it proves the deep pocket defendant is at least one percent to blame. The non-settling defendant, who has no involvement in the settlement, is forced to bear the brunt of the plaintiff's strategy by paying the difference between the settling defendant's true fault and its bargain.

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[12] Significantly, the Maritime Law Association, which has a membership that includes federal judges, law professors, and 3,600 attorneys who represent *both* maritime plaintiffs and defendants, favors the proportionate credit rule. MLA Br. at 1-2. NASCAT, an organization of attorneys that "frequently represent plaintiffs in such actions," NASCAT Br. at 1, opposes it and uses its amicus brief to support the settlement bar rule.

Under the proportionate credit rule, this scenario is eliminated. The plaintiff can no longer force a less culpable but deeper pocket defendant to bear a disproportionate burden that is based not on comparative fault but on comparative solvency. A non-settling defendant cannot be held responsible for any more or any less than the share of the plaintiff's damages it caused. The plaintiff is encouraged to settle on reasonable and fair terms, knowing it will gain nothing by a collusive or irresponsibly low settlement.

In the belief the proportionate credit rule will be harmful to the securities plaintiffs its members represent, NASCAT contends this method (1) will complicate litigation by requiring the trier of fact to make decisions regarding the liability of persons who are no longer parties to the litigation and (2) possibly reduce a plaintiff's total damage recovery. NASCAT Br. at 21-29. Neither criticism is accurate or sound.

First, with respect to NASCAT's "empty chair" argument, litigants have always had to deal with the fault of settling defendants and it is often argued that some party not present was the real cause of the accident. Permitting the finder of fact to determine the proportionate culpability of all defendants at the same time should not present additional difficulty. Under the proportionate credit rule, the conduct of all actors is put before the finder of fact, and the fault of an absent party whose conduct has been proven at trial will be determined based on the evidence. Further, since the plaintiff has settled with the absent party, it should have no difficulty in arranging with the settling defendant to make key

witnesses available as part of the bargain, should this be necessary.

In any event, assuming for the sake of argument that deciding all issues of fault and liability in a single trial is somehow more complicated than the piecemeal proceedings the settlement bar rule promotes, this Court's precedents support the fairer approach. "Potential problems of proof in some cases hardly require adherence to an archaic and unfair rule in all cases." *Reliable Transfer*, 421 U.S. at 407.

Second, NASCAT's assertion that a plaintiff might receive less under a proportionate credit rule than what it might otherwise receive under the settlement bar rule tells only part of the story. It is true that a plaintiff might recover less from a settling defendant than the defendant's share of damages is ultimately determined to be, although NASCAT's own brief suggests such instances should be rare, as "simple economic self interest should insure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant." NASCAT Br. at 12. It is also true, however, that a plaintiff may reach a favorable settlement that exceeds the finder of fact's eventual decision as to the settling party's proportionate fault.[13] Certainly NASCAT does not contend that a plaintiff should not be permitted to keep

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[13] Indeed, in *Leger*, a leading proportionate credit rule decision, this is precisely what happened. The settling defendant paid more than its proportionate share of damages and, as a result, the plaintiff's compensation exceeded his actual damages as determined by the jury. 592 F.2d at 1250.

the benefit of its bargain in the event it settles on favorable terms and is disproportionately or doubly rewarded. It therefore should not be heard to complain that a "shortfall" from a bad settlement violates some abstract notion of what constitutes "full" compensation.

In every settlement there is the risk that a defendant might pay too much or the plaintiff may accept too little. This reality does not undermine the settlement process or destroy its viability. To the contrary, acceptance of a known, certain recovery or liability at the expense of an uncertain, but possibly greater recovery or liability at trial is the precise reason for settling.[14]

NASCAT's desire to have it both ways illuminates a fatal flaw in the premise that underlies its position. The so-called "right to be made whole" NASCAT articulates rests on the erroneous assumption that settlement dollars, obtained at a time of uncertainty, can be equated to damages recovered after a trial. But dollars paid in settlement to avoid litigation risks and expenses cannot be

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[14] NASCAT's stock refrain that as between plaintiffs and defendants, the tortfeasor and not the "innocent victim" should bear any inequity, NASCAT Br. at 5, is particularly inapt here. The jury determined the instant decedents were 35% at fault for their own deaths. Because the federal and state trial courts denied contribution and proportionate fault allocation, the comparative culpability of Boca Grande and other possible defendants has not been determined. It is at least possible, however, that other defendants are substantially at fault and that FP&L's true share of culpability is *less* than the 35% blame the decedents bear. If this is the case, it is manifestly unjust to saddle FP&L with 62½% of the damages when it is in reality less at fault than the "innocent victims."

equated with post-trial dollars paid in satisfaction of a judgment. *See Leger*, 592 F.2d at 1249-50 n.10.

Finally, NASCAT is wrong in its contention that the proportionate credit approach is inconsistent with *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Unlike the instant situation, which is governed by general maritime tort law, *Edmonds* involves the specific statutory regime of immunities and liabilities under the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* It did not touch on settlement issues and for this reason, the language relied on by NASCAT is dicta. *Edmonds* focused on a defendant's avoidance of tort liability by payment of statutorily required benefits, not the public policy considerations presented in cases involving the instant fact pattern, "such as the need to deter collusive settlements without deterring legitimate ones." *Associated Electric*, 931 F.2d at 1270-71.

It is true the *Edmonds* Court recognized its holding would result in inequity, but the inequity was justified based on the "delicate balance" in that case between shipowners, stevedoring companies, and longshoreman, which the court did not want to "knock out of kilter." 443 U.S. at 275. No such "delicate balance" is presented here and, in any event, settling defendants like Boca Grande do not typically enjoy the statutory immunities that were critical to the *Edmonds* decision. Adoption of the proportionate credit rule does not conflict with *Edmonds*.

In sum, both the contribution rule and the proportionate credit rule are consistent with maritime law and policy. The Supreme Court should adopt either one of

these approaches and reject the settlement bar rule, which is inefficient, unfair, and in conflict with the principles articulated by the Supreme Court in the controlling maritime cases.

CONCLUSION

The Supreme Court should either affirm the decision of the Court of Appeals for the Eleventh Circuit and adopt the contribution rule or, in the alternative, reverse and adopt the proportionate credit rule.

STUART C. MARKMAN
(Counsel of Record)
JAMES E. FELMAN
KYNES & MARKMAN, P.A.
100 S. Ashley Drive,
Suite 1300
Post Office Box 3396
Tampa, FL 33601-3396
(813) 229-1118

and

C. STEVEN YERRID
CHRISTOPHER S. KNOPIK
YERRID, KNOPIK & VALENZUELA
101 E. Kennedy Blvd.
Suite 2160
Tampa, FL 33602
(813) 222-8222

Attorneys for Florida Power & Light Company, Inc., Respondent

No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
Post Office Box 1531
Tampa, Florida 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
Post Office Box 838
Tampa, Florida 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PETITIONER'S REPLY BRIEF

REPLY TO RESPONDENT'S STATEMENT OF ISSUE AND STATEMENT OF CASE

In stating the issue presented for review Florida Power asks whether it, as a defendant who paid more than its proportional share of the liability, may seek contribution from Boca Grande Club, who paid less than its share of the loss. It has never been established in this case that Florida Power has been found liable for more than its share or paid more than its share of the total loss. Nor has it ever been established that Boca Grande Club caused or contributed to the loss or paid less than its proportionate share of the loss. In footnotes in the body of its brief Florida Power acknowledges that these fact issues have

not been resolved. (Resp. Br. 13 n.8; 22 n.14). Nevertheless, Florida Power bases its argument against a settlement bar rule upon the erroneous factual assumptions that it was found liable for, and paid more than, its proportional share of the total loss and that Boca Grande Club is primarily responsible for the collision and has paid less than its share. Boca Grande Club will rebut this argument in more detail in the argument portion of this reply brief.

In referring to the power line with which the sailboat collided, Florida Power says that "Boca Grande knew [it] to be dangerous." (Resp. Br. 1). All reasonable persons know that power lines are dangerous. However, that is not the thought Florida Power intends to convey. Rather, the inference is that Boca Grande Club knew that the power line in question was dangerous for some particular reason, as, for example, because it was too close to the water to allow the sailboat that it rented to Robert Polackwich to pass beneath it. This contention is not true. Boca Grande Club did not know that the Florida Power electric line was below its permitted height and for that reason posed a specific danger to the sailboat. (R3-99, Exhibit Folder 2, Ferguson Depo. 41-42). Had the power line been constructed in conformity with the United States Army Corps of Engineers permit issued to Florida Power the collision would never have occurred.[1]

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[1] The mast of the sailboat collided with the power line at a point 26' 7" above the surface of the water. The point of impact on the mast was 11" below its top. (R3-99, Exhibit Folder 2, Exhibit 4, Sheets 5 and 57). There should have been 35' of clearance between the power line and the water according to National Oceanic and Atmospheric Administration Nautical Chart No. 11425. (R3-99, Exhibit Folder 2, Exhibit No. 2). At the point where the power line contacted the mast the line should have been at least 30' above the water to be in compliance with the permit issued by the United States Army Corps of Engineers which authorized erection of the obstruction to navigation. (R3-99, Exhibit Folder 2, Exhibit No. 3 at sheet 5; Adams Depo at 61-65).

Florida Power asserts that Boca Grande Club took the position before the district court that its settlement with the decedent's estates "did not have to be in 'good faith'." (Resp. Br. 2). That statement is not true. Boca Grande Club took the position that the settlement was made in "good faith" and that "[t]he settlement was made in the open, without any collusive purpose or ulterior motive." (JA 56). A copy of the agreement was made part of the court record. (JA 63). Boca Grande Club pointed out to the district court that Florida Power had not revealed in what manner or particular the settlement lacked good faith (JA 55-56) and argued that existing law, *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033, 108 S.Ct. 2017, 100 L.Ed.2d 604 (1988), did not require a good faith hearing before the settlement operated as a bar to the pending contribution claim of Florida Power. (JA 56, 58-60).

In discussing the district court's order granting summary judgment Florida Power asserts that the district judge "specifically rejected" any requirement that Boca Grande Club's settlement with the decedents' estates need be "non-collusive and in good faith." (Resp. Br. 3). This statement is not true. In fact it is blatant innuendo. The order granting summary judgment did not say or suggest that the settlement was collusive or in bad faith.

The order merely refused to tack on the requirement of a good faith hearing to the rule laid down in *Self*. (JA 88-90).

THE PARTIES, AND THE AMICI WHO ARE INVOLVED IN MARITIME CASES, ALL RECOGNIZE THAT THIS CONTROVERSY CAN BEST BE RESOLVED BY ADOPTION AND IMPLEMENTATION OF THE *LEGER* RULE

Boca Grande Club intended that the settlement it made would remove it from this lawsuit and terminate pending contribution claims. That is the relief Boca Grande Club seeks. Florida Power fears that it may be required to pay more than its share of the total loss and wants to preserve the opportunity to return to the district court at some future date to attempt to establish that it has a viable claim for contribution against Boca Grande Club.

Petitioner and Respondent recognize that the best and preferable solution to this controversy is not further litigation in the limitation action presently pending in district court. This controversy can be resolved and further litigation avoided by adopting the *pro rata* rule established in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), and implementing that rule in this maritime case.

The United States and the Maritime Law Association of the United States have each concluded that in maritime cases involving a settlement between a plaintiff and one of several defendants, application of the *pro rata* or *Leger* rule is the best means of determining pending or potential contribution claims and for allocating the settlement

against the overall liability. The expertise of these two *amici* in maritime law lends especial credence to the argument for adoption of *Leger*. Indeed, Boca Grande Club submits that the arguments in favor of implementation of the *pro rata* rule in this case and in future maritime actions are both compelling and convincing.

IF THE COURT DOES NOT ADOPT *LEGER* THEN A SETTLEMENT BAR RULE SHOULD BE ESTABLISHED

The argument advanced by Respondent and the *amici* that a settlement bar rule should not be adopted and applied in this case because such a rule is unfair is not supported by the facts of this lawsuit and is otherwise unpersuasive. This is not the first time that Florida Power has been taken to court to pay for damage caused by obstructions it erected in the navigable waters. *Richey v. Florida Power & Light Company*, 468 So.2d 306 (2 DCA 1985) (Power boat struck unlighted concrete stanchion built by Florida Power). Regrettably, it probably will not be the last time, and, for that reason, Florida Power obviously would like to keep open its options respecting claims for contribution.

The argument against a settlement bar rule is based upon the assumption that the settling party, in this case, Boca Grande Club, is usually the party that is primarily and predominantly responsible for the loss. The argument further assumes that the parties left to go to trial, in this case Florida Power, are virtually free of fault for the casualty; that because of their deep pockets, they cannot settle with the plaintiff and are thus forced to trial where, because of joint and several liability, they are invariably

found liable for the entire loss less only what was paid in settlement by the true wrongdoer. To accept this argument it is necessary to believe that a plaintiff always opts for a quick and cheap settlement with the defendant that is primarily responsible for the greater part of the loss in order to try the case against the party whose only fault is that it has deep pockets and the bad luck to have some connection with the casualty. Merely to state the proposition demonstrates its absurdity. Nevertheless, Florida Power seriously advocates the argument – in its brief it states "it is inherently unfair that the liability of a party such as FP&L should derive not from its own responsibility for the accident but rather from a private contractual arrangement made by others in which FP&L was not permitted to participate." (Resp. Br. 16). This preposterous statement is followed by one equally absurd when Florida Power states that "it is manifestly unjust to saddle FP&L with 62 1/2% of the damages when it is in reality less at fault than the 'innocent victims.' " (Resp. Br. 22 n.14). Is Florida Power truly innocent of wrongdoing that caused the collision?[2] Or, is this argument advanced to

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[2] Before any settlement was undertaken Boca Grande Club filed a motion for summary judgment as to all of the claims filed in the limitation action. The motion was directed at the claims filed by the estates of Robert Polackwich and Jonathan Richards, as well as claims filed by relatives of the decedents, and the indemnity and contribution claims of Florida Power and the manufacturer of the sailboat. (R3-99). The motion was supported by a number of exhibits (R3-99, Exhibit Folder 2) and a legal memorandum. (R3-100). Because of the subsequent settlement and the entry of summary judgment as to the contribution claims it was not necessary for the district court to consider the motion. However, the motion for summary judgment was an

disguise the true nature and full extent of the culpability of Florida Power?[3]

The liability of Florida Power did not arise out of the settlement agreement between Boca Grande Club and the estates of the decedents.[4] The liability of Florida Power is based upon the fact of the violation by Florida Power of the permit which sanctioned the erection of an obstruction to navigation. The permit was issued by the United States Army Corps of Engineers; had the power line been erected in conformity with that permit there would have

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issue in the case before the Eleventh Circuit Court of Appeals but was not ruled upon. *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 606 (11th Cir. 1993). If this court affirms the court of appeals and remands this case, that motion is likely to be one of the first things to which the district court will give attention. The focus of the pending motion is on proximate cause. Boca Grande Club argues and demonstrates that the sole proximate cause for the collision was the low hanging power line erected by Florida Power.

[3] Throughout the limitation action Florida Power sought to fend off the state court actions by the estates of Polackwich and Richards by endeavoring to bring itself under the umbrella of the injunction entered in the limitation action. (Pet. App. A9; R2-55). Florida Power advised the state court that the injunction prohibited prosecution of decedents' claims against Florida Power in the state actions. (JA 42-43; R6-164, Exhibit A). To correct this subterfuge the joint motion asking for dismissal of the settled claims requested that the district court specifically state that the injunction protected only Boca Grande Club. (JA 38; 42-43; 49-50). Of course, the injunction never purported to protect any party other than Boca Grande Club, the owner of the sailboat and the petitioner in limitation.

[4] A total of eight separate claims were included in the settlement, two of which were with the representatives of the estates of Robert Polackwich and Jonathan Richards. (JA 64).

been more than sufficient clearance to permit Robert Polackwich and Jonathan Richards to sail safely beneath it. (See note 1, *supra*). Indeed, violation of the Corps of Engineers permit is negligence *per se*. If the issue of liability is ever tried in the limitation action, Florida Power will bear the burden imposed by *The Pennsylvania*, 86 U.S. 125, 22 L.Ed. 148 (1874); namely, to establish not only that its negligence did not contribute to the collision, but that its negligence *could not have contributed to the collision*. *American Zinc Company v. Foster*, 313 F.Supp. 671, 680-681 (S.D. Miss. 1970), *aff'd*, 441 F.2d 1100 (5th Cir. 1971), *cert. denied*, 404 U.S. 885, 92 S.Ct. 99, 30 L.Ed.2d 95 (1991); *Board of County Commissioners v. M/V Agelos Michel*, 390 F.Supp. 1012 (E.D. La. 1974). Should trial of the contribution claim ever become necessary Florida Power will be faced with a more fundamental problem; namely, the burden of establishing that the collision was caused or contributed to by the fault of Boca Grande Club. The proximate cause issue is the focus of the outstanding motion for summary judgment. As that motion demonstrates (R3-99 and 100) the sole proximate cause for the collision was the negligence of Florida Power in failing to keep its electric line at the height specified in the permit issued by the Corps of Engineers. As the motion points out, no act or omission on the part of Boca Grande Club caused or contributed to the failure of Florida Power to maintain its electric line at the permitted clearance above the water. Thus, proximate cause, an essential element of the Florida Power contribution claim, is lacking and cannot be established. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

RELIABLE DOES NOT RESTRICT ADOPTION OF A SETTLEMENT BAR RULE

The briefs of Respondent and the *amici* contain a great deal of rhetoric to the effect that *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed.2d 251 (1975) prohibits this Court from establishing a settlement bar rule in maritime cases. They argue that the comparative fault principle laid down in *Reliable* will be abused if a settling defendant is permitted to avoid contribution claims. They raise the specter of a non-settling defendant paying more than its proportional share of the total liability and having no recourse to recover overpayment by means of contribution claims against settling defendants. Respondent asserts that *Reliable* mandates that litigation continue until the liability paid by each defendant has been fine tuned and adjusted to the nearest percentage point by the courts. Boca Grande Club urges that a settlement bar rule be adopted because it fosters settlement, conserves judicial resources and permits a plaintiff full or partial recompense without the risk and delay of trial. Neither the Respondent nor the *amici* have effectively blunted these considerations or convincingly shown that settlement, whether whole or partial, is not a dispute ending tool that the law should protect.[5]

This Court was the architect of the comparative fault principle laid down in *Reliable* and, of course, this Court

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[5] Applying the Florida Power theory logically means that *Reliable* will govern cases in which full and complete settlements have been achieved to insure that each defendant paid no more, or less, than its precise proportional part of the entire loss.

shall say how far the *Reliable* principle may be extended to the detriment of other equally deserving legal rules. For example, joint and several liability is a principle applicable in maritime law. Can it be denied that the *Reliable* concept of comparative fault is inconsistent with joint and several liability? If *Reliable* is to be applied to its logical limit then joint and several liability must fall. However, so far as Boca Grande Club is aware, the concept of joint and several liability is not presently under attack upon the basis that it conflicts with *Reliable*. Similarly, the fact that a settlement bar rule may impinge to some degree upon the unfettered application of the principle of comparative fault does not mean that this Court must inexorably strike down a settlement bar rule to protect *Reliable*.

A settlement bar rule and *Reliable* can comfortably coexist. *Rufolo v. Midwest Marine Contractor, Inc.*, 6 F.3d 448 (7th Cir. 1993); *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989).

CONCLUSION

The judgment of the court of appeals should be reversed. This Court should adopt for application in this case and future maritime cases either a rule that makes claims for contribution by non-settling tortfeasors against settling tortfeasors unnecessary or a rule that will bar such claims.

Respectfully submitted,

JACK C. RINARD
(Counsel of Record)
MACFARLANE FERGUSON
P. O. Box 1531
Tampa, FL 33601
(813) 273-4200

and

DAVID F. POPE
LAU, LANE, PIEPER, CONLEY
& MCCREADIE, P.A.
P. O. Box 838
Tampa, FL 33601
(813) 229-2121

Attorneys for Boca Grande Club, Inc., Petitioner

No. 93-180

In the Supreme Court of the United States

OCTOBER TERM, 1993

BOCA GRANDE CLUB, INC., PETITIONER

v.

FLORIDA POWER & LIGHT COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether, in a tort action under the general maritime law, defendants who do not settle before trial but proceed to trial may seek contribution from defendants who are joint tortfeasors but who settled with the plaintiff prior to trial.

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INTEREST OF THE UNITED STATES

This case presents an important question of federal admiralty law concerning the proper apportionment of damages in tort cases in which some defendants settle with the plaintiff before trial but other defendants proceed to trial and judgment. Specifically, the question on which the Court granted review in this case is whether the nonsettling defendant may seek contribution from a settling defendant. This case is closely related to *McDermott, Inc.* v. *AmClyde and River Don Castings Ltd.*, No. 92-1479 (set for argument January 11, 1994), because a threshold question in

resolving the problem presented here is whether the liability of the nonsettling defendant to the plaintiff should be reduced by the proportionate share of the total liability owed to the plaintiff (the so-called "pro rata" rule) or instead by the dollar amount of the settlement with the settling defendant (the so-called "pro tanto" rule). We have filed a brief on behalf of the United States as amicus curiae in *McDermott*, arguing that the Court should adopt the pro rata rule. If the Court adopts that rule, then the nonsettling defendant would have no occasion to seek contribution from the settling defendant, and thus the question presented in this case would not need to be addressed.

In addition to the general interest of the United States in the uniquely federal law of admiralty, the United States has a particular interest in the problem at issue here and in *McDermott*, because it frequently is a party to admiralty tort suits, including suits brought against it under the Suits in Admiralty Act, 46 U.S.C. App. 741-752, and the Public Vessels Act, 46 U.S.C. App. 781-790. Indeed, the United States was a party to this Court's leading case in the area, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). Moreover, because any of the proposed rules would benefit the United States in some cases and burden it in others, the United States has a uniquely detached interest in the establishment of the most logical and coherent rules for resolution of the problems at issue in this case and in *McDermott*.

STATEMENT

1. Robert Polackwich, a member of petitioner Boca Grande Club, rented a sailboat from petitioner. On April 23, 1988, Polackwich and his stepson, Jonathan

Richards, were electrocuted while operating the boat, when its mast came into contact with high-voltage power lines owned by respondent. The accident occurred in the navigable waters of the United States. The estates of the deceased individuals brought suit in a Florida state court against petitioner, respondent, and the manufacturer of the boat (O'Day Corporation). Respondent and O'Day in turn brought third-party actions seeking contribution and indemnity from petitioner. See Pet. App. A5, A11; J.A. 6-7.

2. Petitioner then commenced this action in the United States District Court for the Middle District of Florida, seeking to limit its liability to the value of the vessel. J.A. 5-9; see 46 U.S.C. App. 181 *et seq.* Respondent and O'Day filed claims against petitioner for indemnity and contribution in the district court (J.A. 10-15, 16-20), and the estates of the decedents filed claims against petitioner seeking recovery for wrongful death (J.A. 27-31). Subsequently, the estates of the decedents settled their claims against petitioner for $225,000; the district court accordingly dismissed those claims. Pet. App. A11-A13, A24-A26.

Petitioner then filed a motion seeking summary judgment on the claims for indemnity and contribution brought by respondent and O'Day. The district court granted summary judgment in favor of petitioner. Pet. App. A5-A7.[1] The court explained that under "current case law" in the Eleventh Circuit, "a joint tortfeasor is barred from seeking contribution from a settling joint tortfeasor," and "the plaintiff

[1] The district court did not proceed with the claim brought by O'Day because O'Day had entered bankruptcy proceedings. Pet. App. A7.

may recover the full amount of damages, minus the amount received from the settling defendant, from the remaining tortfeasors." *Id.* at A6 (citing *Self* v. *Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)). The district court declined respondent's suggestion, based on *Miller* v. *Christopher*, 887 F.2d 902 (9th Cir. 1989), and Section 886A of the Restatement (Second) of Torts, to impose a qualification that contribution from a defendant who settled is barred only if the parties settled in good faith. Pet. App. A6.[2]

3. The court of appeals reversed in a brief per curiam opinion. Pet. App. A1-A2. The court explained that its recent decision in *Great Lakes Dredge & Dock Company* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, cert. denied, 113 S. Ct. 484 (1992), had rejected the analysis on which the district court relied and had determined that "under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." Pet. App. A2. Accordingly, the court of appeals vacated the district court's award of summary judgment and remanded for further proceedings on respondent's claim for contribution. *Ibid.*

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents an important question of federal maritime law: whether a defendant that does not settle a maritime tort claim before trial, but proceeds to a trial at which a judgment is entered against it, is entitled to seek contribution from other

[2] Respondent conceded that its claim against petitioner for indemnity was barred as a matter of law, Pet. App. A6, and the indemnity claim therefore is not at issue here.

joint tortfeasors that settled with the plaintiff in advance of trial. Before the Court considers that question, it should, in our view, consider an analytically prior question, which is before the Court in *McDermott, Inc.* v. *AmClyde and River Don Castings Ltd.*, No. 92-1479 (set for argument January 11, 1994): whether the total amount of liability found to be owed to the plaintiff should be reduced by the proportionate share of the liability attributable to negligence on the part of the settling defendants (the so-called pro rata approach),[3] or instead should be reduced by the dollar amount of the settlement (the so-called pro tanto approach). If the Court adopts the pro rata approach, then it would be inappropriate to allow the nonsettling defendant to seek contribution from the settling tortfeasor, because the judgment against the nonsettling defendant already would have been reduced to take appropriate account of the settling tortfeasor's share of responsibility for the tort. In our brief in *McDermott* [hereinafter Gov't *McDermott* Br.], we argue that the Court should adopt the pro rata approach.[4] If the Court does not

[3] Amicus National Association of Securities and Commercial Law Attorneys (NASCAT) suggests that the rule we advocate in *McDermott* is more appropriately referred to as a "proportional reduction" rule, and that the term "pro rata" rule should be applied to a system that reduces liability based on the assumption that each defendant bore an equal share of the liability (so that liability would be reduced by one-fourth if one out of four defendants had settled). For consistency, we use the term "pro rata rule" to refer in this brief, as in our brief in *McDermott*, to a system that reduces the nonsettling defendant's liability by the proportionate share of liability attributable to the settling defendants.

[4] We have provided counsel for the parties and the amici with copies of our brief in *McDermott*. The brief on the merits

adopt that approach, however, it should allow the nonsettling tortfeasor to seek contribution from tortfeasors that settled before trial.[5]

2. This case presents a question of general maritime law, as to which no Act of Congress is dispositive.[6] Accordingly, the Court should adhere to its practice of "tak[ing] the lead in formulating flexible and fair remedies in the law maritime," *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In *Reliable Transfer*, the Court determined that liability in maritime tort cases generally should be determined on the basis of principles of comparative fault. A rule permitting contribution furthers that principle by requiring a joint tortfeasor that settled before trial to contribute to judgments against other tortfeasors, but only if (and to the extent) the settlement did not require the settling tortfeasor to pay a share of the liability that is equivalent to its share of responsibility for the tort.

The principal argument against a rule permitting contribution is that such a rule would unduly discourage settlements, by leaving settling tortfeasors open to the risk of future litigation. That argument, however, ignores the deterrent effect of the costs incurred by the nonsettling tortfeasor in bringing a subsequent action for contribution, as well as the possibility of litigation over whether the parties entered into the settlement in good faith, which would be likely to occur if contribution generally were barred. Moreover, if a plaintiff wishes to secure a settlement from a tortfeasor predicated on the tortfeasor's absolute protection from further liability, the plaintiff can agree to indemnify the tortfeasor from suits for contribution.

As a general matter, any adverse effects that a rule of contribution otherwise might have on settlement would be vitiated if the Court adopts the pro rata rule we urge in *McDermott*. But if the Court adopts the

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of petitioner in this case states that it supports the pro rata rule we urge in *McDermott*, Pet. Br. 5 ("Petitioner submits that the *pro rata* or comparative fault rule is preferable because it extinguishes the proportional share of the liability of the settling defendant and makes contribution unnecessary.").

[5] We stated our position on this contribution issue (without substantial elaboration) in our brief in *McDermott*, in the event the Court were to reject the pro rata rule in that case. Gov't *McDermott* Br. 10 n.3, 16 n.9.

[6] The Court has reached differing results on the propriety of actions for contribution in contexts governed by specific Acts of Congress. Compare, *e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 634-646 (1981) (no right to contribution in action under Section 1 of the Sherman Act, 15 U.S.C. 1), with *Musick, Peeler & Garrett* v. *Employers Insurance*, 113 S. Ct. 2085, 2089-2092 (1993) (right to contribution in implied right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, by reference to the express right of contribution under Sections 9(e) and 18(b) of the 1934 Act, 15 U.S.C. 78i(e) and 78r(b)). Where an Act of Congress expressly confers a right of contribution, a further question would be presented in a case such as this—namely, whether the courts would have the authority to bar a nonsettling defendant from invoking that statutory right against a settling defendant based on the courts' own determination that such a bar would encourage settlements. Here, however, the right of contribution itself is not conferred by Act of Congress, but instead has been recognized by the Court in its elaboration of principles of maritime law. The appropriateness of a bar to contribution against a settling defendant therefore is a matter for the Court to consider within the broader framework of comparative fault the Court has articulated in this setting.

pro tanto approach, we believe the paramount interest in fair allocation of liability for maritime torts weighs in favor of a rule of contribution, notwithstanding the adverse effects it might have on settlement.

ARGUMENT

IF FEDERAL MARITIME LAW HOLDS A DEFENDANT WHO PROCEEDS TO TRIAL LIABLE FOR THE ENTIRE AMOUNT OF THE JUDGMENT, REDUCED ONLY BY THE DOLLAR AMOUNT OF ANY SETTLEMENTS ENTERED INTO BY JOINT TORTFEASORS, THE NONSETTLING DEFENDANT SHOULD BE PERMITTED TO SEEK CONTRIBUTION FROM SETTLING JOINT TORTFEASORS

As we explain in detail in our brief in *McDermott* (Gov't *McDermott* Br. 11-14), "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963), and this Court has responded by attempting to "formulat[e] flexible and fair remedies," *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). When the question is one of maritime tort law, the Court has attempted to ascertain the rule that "[u]nder the circumstances [is] most just and equitable, and * * * best tend[s] to induce care and vigilance on both sides, in the navigation." *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 177-178 (1855); see *Reliable Transfer*, 421 U.S. at 402-403.[7] In this case,

[7] As we explain in our brief in *McDermott*, the Court has not customarily looked to state law in resolving issues of general maritime law. Gov't *McDermott* Br. 14 n.8. To the extent that the tort law of the States is relevant, however, Section 5 of the 1939 version of the Uniform Contribution Among Tortfeasors Act generally provides that a settlement by one tortfeasor does not protect that tortfeasor from a subsequent action for contribution. 12 Uniform Laws Annotated 58 (1975). That provision (or a substantially similar provision) is codified in at least eight States. See Ark. Code Ann. § 16-61-205 (Michie 1987); Del. Code Ann. tit. 10, § 6304(b) (1975); Haw. Rev. Stat. § 663-15 (1988); Idaho Code § 6-806 (1990); Md. Ann. Code art. 50, § 20 (1991); Pa. Stat. Ann. tit. 42, § 8327 (1982); R.I. Gen. Laws § 10-6-8 (1985); S.D. Codified Laws Ann. § 15-8-18 (1984).

On the other hand, Section 4 of the 1955 version of the Uniform Contribution Among Tortfeasors Act protects a settling tortfeasor from suits for contribution by other tortfeasors, but only if the settlement was entered into in good faith. 12 Uniform Laws Annotated 99 (1975). That provision (or a substantially similar provision) is codified in at least 16 States. Ariz. Rev. Stat. Ann. § 12-2504 (Supp. 1993); Cal. Civ. Proc. Code § 877 (West Supp. 1993); Fla. Stat. Ann. § 768.31(5) (West 1986); 740 Ill. Compiled Stat. § 100/2(c) and (d) (1993); Mass. Ann. Laws ch. 231B, § 4 (Law. Co-op. 1986); Mich. Comp. Laws Ann. § 600.2925d (West 1986); Mo. Ann. Stat. § 537.060 (Vernon 1988); Nev. Rev. Stat. Ann. § 17.245 (Michie 1986); N.H. Rev. Stat. Ann. § 507:7-h (1992); N.C. Gen. Stat. § 1B-4 (1992); N.D. Cent. Code § 32-38-04 (1976); Okla. Stat. Ann. tit. 12, § 832.H (West 1988); Or. Rev. Stat. Ann. § 18.455 (Butterworth 1988); S.C. Code Ann. § 15-38-50 (Law. Co-op. Supp. 1992); Tenn. Code Ann. § 29-11-105 (1980); Va. Code Ann. § 8.01-35.1 (Michie 1992). Texas and Washington have adopted non-uniform provisions that also bar contribution in similar circumstances. Tex. Civ. Prac. & Rem. Code Ann. § 33.015(d) (West Supp. 1993); Wash. Rev. Code Ann. § 4.22.606 (West 1988).

those considerations support a right of contribution against the settling joint tortfeasor if the settlement does not result in a proportionate reduction in the total liability to the plaintiff.

A. A Rule Permitting A Tortfeasor To Seek Contribution From Joint Tortfeasors That Settled Before Trial Furthers The Interest in Apportioning Liability According To The Comparative Fault Of The Parties

Although common-law courts did not generally require contribution among joint tortfeasors,[8] that rule—if it ever did apply in admiralty—has had at best limited application in that context for more than five centuries.[9] Similarly, this Court early on noted the impropriety of requiring a single party to bear all liability in a collision case involving the mutual fault of both vessels, *Strout* v. *Foster*, 42 U.S. (1 How.) 89, 92 (1843). In 1855, the Court responded to that

[8] *E.g.*, *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799); see *Union Stock Yards Co.* v. *Chicago, B.&Q.R.R.*, 196 U.S. 217, 224 (1905). The English rule against contribution was abolished as a general matter by Section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, ch. 30. In maritime cases involving injury to person, contribution was expressly permitted by Section 3 of the British Maritime Conventions Act, 1911, 1 & 2 Geo. 5, ch. 57, in which Great Britain adopted the Brussels Collision Convention of 1910. See Henry V. Brandon, *Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 Tul. L. Rev. 1025, 1028 (1977).

[9] One writer traces the history of contribution in maritime law to the thirteenth century and observes that "there is no reason to suppose it to have been an innovation then." Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304, 305-310 (1957); see *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974) ("In *The North Star*, 106 U.S. 17 (1882), Mr. Justice Bradley traced the doctrine [permitting sharing of damages among the parties in collision cases] back to the Laws of Oléron which date from the 12th century, and its roots no doubt go much deeper.").

concern by holding that where two vessels collide at sea damages should be divided equally between the joint tortfeasors. *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 177-178 (1855). The Court soon extended that rule of divided damages to other cases involving property damage, *The Alabama and the Game-cock*, 92 U.S. 695, 696-698 (1876), and then applied it to personal injury cases in *The Max Morris*, 137 U.S. 1, 7-15 (1890). Hence, by the turn of the century Justice Holmes was able to observe that, despite the "rule of the common law * * * that there is no contribution between wrongdoers * * * the admiralty rule in this country is well known to be the other way." *Erie R.R.* v. *Erie & Western Transport Company*, 204 U.S. 220, 225 (1907).

As the Court in this century has attempted to apply modern tort principles in the maritime context, it has increasingly emphasized the principle—which underlies the Court's nineteenth century decisions permitting divided damages—that the exposure of parties that jointly commit a maritime tort should, to the extent feasible, be based on comparative fault. Thus, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court reaffirmed the general rule that joint tortfeasors are entitled to contribution, explaining that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Id.* at 111 (internal quotation marks omitted).

Finally, in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court overruled the venerable rule of equally divided damages articulated in *The Schooner Catharine*. Significantly for present pur-

poses, the Court did not dispense with that rule in favor of a more limited contribution regime similar to the one sought by petitioner—which would protect joint tortfeasors from suits for contribution as a matter of law—but in favor of a more precise rule of comparative negligence, under which each party bears a liability commensurate with its share of responsibility for the injury. The Court characterized the divided-damages rule as "an ancient form of rough justice" that has no place in a modern system of tort compensation, under which each party should "assum[e] a share of the * * * damages in proportion to its share of the blame, [unless] proportionate degrees of fault cannot be measured and determined on a rational basis." 421 U.S. at 403, 405; see *id.* at 407 (stating that the rule of divided damages is "unnecessarily crude and inequitable in a case * * * where an allocation of disparate proportional fault has been made").

The motivating force of the Court's analysis in *Reliable Transfer* was the principle that a tort system should be designed to allocate liability among all parties in accordance with their respective degrees of fault. The failure of the divided-damages rule to comport with that principle was the basis for the Court's decision to overrule *The Schooner Catharine*. In this case, that same principle calls for a rule that permits contribution. Absent contribution, the defendant that proceeds to trial would be liable for the entire amount of the liability not recovered by the plaintiff in settlement with other defendants, even if the nonsettling defendant's "share of the blame,"

Reliable Transfer, 421 U.S. at 405, was quite small.[10] That result is just as inequitable as the result rejected in *Reliable Transfer*. See Restatement (Second) of Torts § 886A comment m, at 343 (1977) (contribution bar "can be very unfair to the other tortfeasors"). Accordingly, the Court should adopt a rule of maritime tort law generally permitting a party adjudged liable for a portion of the responsibility for a maritime tort that properly is attributable to a joint tortfeasor to seek contribution from that joint tortfeasor.

B. A Suit For Contribution Against A Joint Tortfeasor That Settled Before Trial Does Not Improperly Undermine Incentives For Settlement

The only apparent difference between this case and *Cooper Stevedoring* is that the joint tortfeasor against whom contribution is sought in this case entered into a settlement before trial. Petitioner argues (Pet. Br. 18-21) that the interest in encouraging settlement justifies a rule that bars suits for contribution against defendants that settled their dispute with the plaintiff before trial. That argument posits a stark conflict between the interest in encouraging settlement and the interest in apportioning liability in accordance with comparative fault. At

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[10] See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.7 (1979) (quoting *The Atlas*, 93 U.S. 302, 315 (1876)) ("Nothing is more clear than the right of the plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.").

the outset, we note that the posited conflict is largely illusory, because both interests would be furthered by the rule we urge in *McDermott*: under that rule, defendants that settled before trial would be immune from subsequent actions by their joint tortfeasors for contribution, and defendants that proceed to trial would not be required to bear a portion of the liability attributable to the share of fault of those joint tortfeasors that settled before trial. In any event, if the Court rejects our argument in *McDermott*, we nevertheless believe that the interest in encouraging settlement does not justify a bar to contribution among joint tortfeasors in the maritime context, even when one or more of the joint tortfeasors has settled with the plaintiff prior to trial.

First, it seems most unlikely that a general bar to contribution would protect settling joint tortfeasors from all future litigation, because a contribution-bar rule presumably would be qualified by the requirement that the parties settled in good faith. Petitioner opposes even that qualification (Pet. Br. 21-23), but the consequences of such an absolute rule are striking: a collusive agreement between the plaintiff and one tortfeasor (for example, an agreement between a plaintiff and a related party that shared some responsibility for the tort) would leave other tortfeasors exposed to liability for substantially all of the harm caused by the tort. Accordingly, the courts of appeals that have considered the question generally have barred contribution only when the parties entered into the settlement in good faith. *Miller* v. *Christopher*, 887 F.2d 902, 903-908 (9th Cir. 1989); *Rufolo* v. *Midwest Marine Contractors, Inc.*, No. 92-1593 (7th Cir. Sept. 29, 1993), slip op. 6-8; see Restatement (Second) of Torts § 886A comment m, at

343 (1977) (contribution-bar rule without good-faith limitation "provides a clear incentive to collusion between the settling parties").[11] If this Court were to follow that trend and adopt a contribution-bar rule limited to good-faith settlements, then the principal benefit of a contribution-bar rule—firm protection against future litigation—would be substantially vitiated. As the Restatement (Second) of Torts explains, "once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated." § 886A comment m, at 343; see *Rufolo*, slip op. 17 (Eisele, J., concurring) ("A mini-trial concerning the merits of the settlement will usually be required to determine whether the liability assumed by the settling tortfeasor is reasonably related to the strength of the plaintiff's claims."); 2 *Benedict on Admiralty* § 3.c[2], at 1-10 (6th ed. 1993) (litigation over the question of good faith "brings the case back to the courts to determine whether this standard has been met, thereby reducing the benefit of the final disposition of a claim through settlement").[12]

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[11] The States that have enacted a contribution-bar rule by statute generally have done so by enacting the 1955 version of the Uniform Contribution Among Tortfeasors Act, which limits the contribution-bar rule to good-faith settlements. See note 7, *supra*.

[12] The propriety of a good-faith limitation on a contribution-bar rule is not squarely presented by the petition in this case and was not addressed by the court of appeals (which held that contribution generally is permissible). Accordingly, if the Court rejects our submissions in *McDermott* and in this case and adopts a contribution-bar rule—but chooses not to decide in

Second, any adverse effect on a defendant's willingness to settle can be overcome entirely if the plaintiff agrees to hold the defendant harmless from subsequent actions for contribution. Such an agreement would ensure that the defendant's liability was finally determined at the time of the settlement.[13] Nor is it unfair to expect a plaintiff to agree to such a term. A plaintiff could not have a substantial objection to such a term unless two conditions were true: (1) the plaintiff believes that there is a substantial likelihood that an ensuing trial would demonstrate that the settling defendant paid less than its proportionate share of the harm caused by the tort, and (2) the plaintiff believes that one of the tortfeasors (rather than the plaintiff) should bear the risk of that likelihood. But neither of the plaintiff's options under the latter condition deserves protection in this context. A plaintiff's desire that the settling defendant bear the risk that the plaintiff settled for too little is inconsistent with the plaintiff's willingness to accept the amount offered by the defendant as a definitive resolution of its liability; we see little value in encouraging such settlements. And the plaintiff's alternative desire—that the nonsettling tortfeasors bear that risk, and thus, ultimately, bear a share of liability beyond their share of the fault—is

the first instance whether the contribution-bar rule should be limited to good-faith settlements—it would be appropriate for the Court to remand the case to the court of appeals to permit that court to consider the propriety of a good-faith limitation in the first instance.

[13] In the alternative, the plaintiff could enter into an agreement limiting its right of recovery against the nonsettling defendants to their proportionate share of the liability.

inconsistent with the comparative fault principles this Court articulated in *Reliable Transfer*. Moreover, because the disproportionate allocation of responsibility is entirely within the control of the plaintiff, it falls afoul of the principles set out in *Cooper Stevedoring*, where the Court decried a system that "permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." 417 U.S. at 111.

In any event, whatever effect permitting contribution against a settling tortfeasor might have on the incentives favoring pretrial settlement, we submit that the paramount interest in requiring tortfeasors to be responsible for their share of liability—and only for their share of liability—requires suits for contribution in these circumstances. The respondent in *Reliable Transfer* argued that a proportional fault rule would discourage settlements. Although the Court was not persuaded that the rule it adopted in fact would have that effect (421 U.S. at 407-408), the Court went on to observe that the argument, even if true,

> could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

Id. at 408. The same concern applies here.

CONCLUSION

If the Court does not apply to this case a rule requiring that the liability of a nonsettling defendant be reduced by the proportionate share of the liability attributable to a settling defendant, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ROBERT S. GREENSPAN
RICHARD A. OLDERMAN
Attorneys

DECEMBER 1993

No. 93-180

In The

Supreme Court of the United States

October Term, 1993

BOCA GRANDE CLUB, INC.,

Petitioner,

vs.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF SECURITIES AND COMMERCIAL LAW ATTORNEYS ("NASCAT"), IN SUPPORT OF NEITHER PARTY, URGING REVERSAL

JONATHAN W. CUNEO
(General Counsel,
NASCAT)
LAW OFFICES OF
JONATHAN W. CUNEO
1300 K Street, N.W.
Suite 650, East Tower
Washington, D.C. 20005
Telephone: 202/789-3960

WILLIAM S. LERACH
(Counsel of Record)
KEITH F. PARK
LEONARD B. SIMON
KEVIN P. RODDY
ERIC A. ISAACSON
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway,
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

Attorneys for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a settlement between a joint tortfeasor and plaintiff may bar nonsettling defendants' later claims for contribution against the settling tortfeasor.

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I. INTEREST OF AMICUS CURIAE

NASCAT is an association of law firms and attorneys located throughout the United States. NASCAT advocates principled interpretations of law to facilitate the effective prosecution and settlement of securities fraud class actions and other complex commercial litigation. NASCAT's members frequently represent plaintiffs in such actions.

NASCAT and its members have an interest in this case because this Court's decision may affect the rules governing settlement of claims against joint tortfeasors. Although the parties before the Court frame the issues in terms of the rules that apply to settlements under maritime law or in admiralty, the underlying principles of joint liability and contribution are not necessarily limited to the field of admiralty. Joint liability applies generally whenever common law or statutory claims are based on the wrongdoing of more than one person, and claims for contribution are recognized in an ever-increasing variety of cases – from common law actions for negligence to federal statutory claims.

Of particular importance to NASCAT and its members is the fact that contribution is available to joint wrongdoers under the federal securities laws.[1] Recognition of contribution under the securities laws has a profound impact on the prosecution and settlement of securities fraud cases. Depending on how the interest in contribution is interpreted and applied by the courts, settlement of claims and compensation of victims of fraud may be facilitated or frustrated.

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[1] The Securities Act of 1933 (the "Securities Act") provides for contribution among those jointly liable for violations of §11 of that Act, *see* 15 U.S.C. §77k(f), and Sections 9 and 18 of the Securities Exchange Act of 1934 (the "Exchange Act") also provide for contribution among defendants who violate their provisions. *See* 15 U.S.C. §§78i, 78r. This Court recently recognized an implied right to contribution to benefit defendants who violate Section 10(b) of the Exchange Act, 15 U.S.C. §78j(b). *See Musick, Peeler & Garrett v. Employers Insurance of Wausau*, ___ U.S. ___, 113 S. Ct. 2085, 2091-92 (1993).

II. SUMMARY OF ARGUMENT

This Court granted certiorari to consider a single issue: Whether "settlement between a joint tortfeasor and a plaintiff bars all claims for contribution by nonsettling tortfeasors against the settling tortfeasor." *See* Petition for Certiorari at i; *Boca Grande Club, Inc. v. Florida Power & Light Co.*, ___ U.S. ___, 125 L.Ed.2d 788, 62 U.S.L.W. 3241 (Sept. 28, 1993) (granting certiorari).

The Petitioner correctly urges the Court to hold that a partial settlement of claims may bar actions for contribution by defendants who did not settle and are ultimately found to be liable. *See infra* §III.A. Contribution is based on equitable principles, and should be shaped to further the public policy goals of compensating tort victims and of simplifying litigation. *See infra* §III.A.1. If claims for contribution can be barred, a joint defendant has an incentive to compensate its victim with a partial settlement because by doing so it can avoid the risks and expense of litigating the case through trial. However, a defendant gains little or nothing by settling a plaintiff's claims against it if the defendant remains liable to its codefendants for contribution based on the very claims that were settled. The equitable doctrine permitting actions for contribution among joint tortfeasors should not be allowed to defeat the superior equitable interest of their victims in obtaining compensation through such settlements. *See infra* §III.A.2-4.

The parties may ask this Court to decide – or assume the answer to – a second question: The effect a settlement and contribution bar will have on a plaintiff's claims against defendants who do not settle. The Court should not reach this second issue which is not encompassed in

the grant of certiorari. *See infra* §III.B. The real dispute on this point is not between the Petitioner and the Respondent. It is between the Respondent and the victims of the parties' joint tort, who are not represented before this Court. The issues involved are important and complicated. This Court need not and should not reach the question of the precise effect a settlement has on the claims of a settling plaintiff. The decision of this issue could have far reaching consequences; it should be reserved for a case where it is squarely presented and can be thoroughly briefed. *See infra* §III.B.1.

This Court should *not*, in any event, endorse the parties' assumption that their victims' right to be made whole may be prejudiced by requiring a "proportionate fault" reduction of the nonsettling defendant's liability to the plaintiffs in this case. The proportionate fault rule that the parties approve of deprives tort victims of the right to be made whole, imposing a severe penalty on plaintiffs who settle with some but not all of the defendants in the case. The proportionate fault rule discourages settlement and greatly complicates litigation of complex cases. Contribution is an equitable doctrine that can facilitate the settlement of claims, permitting a joint tortfeasor who compensates the victim to spread the cost of that payment to its joint tortfeasors who otherwise would be unjustly enriched by avoiding their liability to the plaintiff; it cannot reasonably be interpreted to shift the cost of a settlement to the victim of a tort. In *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 272 n.30 (1979), this Court observed that while a joint tortfeasor's equitable interest in obtaining contribution from other joint tortfeasors "may sometimes limit the

ultimate loss" suffered by a tortfeasor, "it does not justify allocating more of the loss to the innocent [victim of their tort], who was not unjustly enriched." *Id.* *See infra* §III.B.2.

III. ARGUMENT

A. A Settling Defendant Should Be Able To Bar Its Joint Tortfeasors' Claims For Contribution

The fact that courts, in the exercise of their equitable powers, properly permit actions for contribution in order to encourage settlement of claims, and to prevent unjust enrichment of tortfeasors who refuse to settle or pay, provides no legitimate ground for holding that defendants who do settle claims against them must remain exposed to the very liability they sought to avoid by entering a settlement.

1. Joint Tortfeasors' Equitable Interest In Contribution Should Not Be Construed Or Applied To Defeat The Equitable Interest Of Their Victims In Compensation Through Partial Settlement Of Claims

Respondent's claimed "right" to contribution is in reality an equitable interest, recognized by courts in the exercise of their equitable discretion.[2] The victim of a tort

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[2] "Traditionally, equity has been the hallmark of contribution. The doctrine originated in courts of equity, and its rationale has not been altered by adoption in the common law." *Gould v. American-Hawaiian Steamship Co.*, 387 F. Supp. 163, 170

has a superior interest in obtaining compensation without unnecessary delay and expense. Courts should *not* transform the equitable interest in contribution among joint wrongdoers into a legal right that tramples the equitable interests of their victims by making partial settlements virtually impossible.

The common law initially rejected contribution among joint tortfeasors on the ground that courts should not intervene among wrongdoers.[3] When courts recognized contribution among joint tortfeasors they did so pursuant to principles of equity in order to favor the tortfeasor who discharged a common liability by paying more than its proportionate share of damages, and to prevent the unjust enrichment of joint tortfeasors who refused to compensate victims of their joint wrongdoing. *See George's Radio, Inc. v. Capital Transit Co.*, 126 F.2d 219, 220-21 (D.C. Cir. 1942). "Such contribution, however, must arise from the duty each of the wrongdoers owes to the injured party and not from any obligation among themselves." *Fischbach & Moore International Corp. v. Crane Barge R-14*, 632 F.2d 1123, 1125 (4th Cir. 1980).

(D. Del. 1974), *vacated on other grounds*, 535 F.2d 761 (3d Cir. 1976); *accord Dawson v. Contractors Transp. Corp.*, 467 F.2d 727, 731-32 (D.C. Cir. 1972); *Jones v. Schramm*, 436 F.2d 899, 901 (D.C. Cir. 1970).

[3] *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 634 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 86-88 & n.16 (1981); *Union Stock Yards Co. v. Chicago B. & Q.R. Co.*, 196 U.S. 217, 224 & 228 (1905); *Merryweather v. Nixan*, 8 Term Rep. 186, 101 Eng. Rep. 1337 (K.B. 1799).

If the interest in contribution is equitable in character, and arises from the duty each of the wrongdoers owes to the injured party, then it ought to be interpreted and applied in a fashion that takes account of the interests of the joint tortfeasors' victim. The party whose interests have the greatest equitable weight in shaping the right of contribution among joint wrongdoers *is the victim of their wrongdoing*. *See Edmonds*, 443 U.S. at 272 n.30. Sensibly applied, contribution among wrongdoers may actually benefit the injured party – for partial settlements are encouraged if a defendant who compensates the victim of a joint tort obtains a cause of action for contribution against the other joint tortfeasors.[4]

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[4] The settling defendant's access to contribution creates an incentive encouraging settlement, because a defendant who knows a joint tort was committed is free to pay the victim and to pursue contribution against its joint wrongdoers. Congress recognized that availablity of contribution can encourage settlement when it provided for contribution under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§9601-9675. When amendments providing for contribution under CERCLA were offered, the Chairman of the Senate Judiciary Committee explained their purpose: "All of the expert witnesses before the Committee agree that the right to contribution should be codified *in order to encourage responsible parties to engage in cleanup and settlement.*" 131 Cong. Rec. S. 11,857 (daily ed. Sept. 20, 1985) (emphasis added) (quoted in *United States v. New Castle County*, 642 F. Supp. 1258, 1268 n.10 (D. Del. 1986)). In shaping CERCLA Congress provided that a person "who has resolved its liability to the United States . . . for some or all of a response action . . . in an administrative or judicially approved settlement may seek contribution from any person who is not a party to a settlement." 42 U.S.C. §9613(f)(3)(B). Congress further provided that a defendant who settles the claims against it "shall not be liable for

The availability of partial settlements increases the likelihood that the injured party will receive speedy compensation for the wrongs he or she has suffered. Whenever courts are faced with choices in shaping the right to contribution among joint wrongdoers, their first consideration must be whether the rules to be chosen will have an impact on the victim of joint wrongdoing. Rules that operate to the disadvantage of the victim of joint wrongdoing ought to be rejected, and rules that operate to the advantage of the victim of the joint wrongdoing ought to be favored. Considerations of equity among wrongdoers ought never be allowed to control over the overriding interest of doing equity to their joint victim: " 'Promoting full recovery and encouraging partial settlement take

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claims for contribution regarding matters addressed in the settlement." 42 U.S.C. §9613(f)(2). Congress thus encouraged settlement while preserving the right to full recovery by providing that "[s]uch settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." *Id.*; *see also* 42 U.S.C. §9622(g)(5). These provisions were designed "to codify the right [to contribution] and, *retaining current law* would allow a judge the discretion and flexibility to manage the contribution issues in a law suit." 131 Cong. Rec. S. 11,857 (emphasis added) (quoted in *New Castle County*, 642 F.Supp. at 1268 n.10).

The Eleventh Circuit's holding in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1584-85 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992), that a settling defendant retains the right to pursue claims for contribution against joint tortfeasors who did not settle is eminently sensible. Its holding that claims for contribution *against* a settling defendant cannot be barred is not sensible. *See infra* §III.A.2.

precedence over the . . . policy of enforcing an equitable apportionment of a loss among responsible defendants.' "[5]

2. Without Contribution Bars Partial Settlements Are Virtually Impossible

Settlement of claims can be encouraged only if a defendant who settles with the plaintiff thereby avoids further liability. Settlement makes sense precisely because it defines and limits the scope of a party's liability. If a joint tortfeasor who settles a victim's claim against it still faces claims for contribution based upon the very same liability, he or she gains nothing by settling. *See In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 (4th Cir. 1991); *Nelson v. Bennett*, 662 F. Supp. 1324, 1328-29, 1334-35 (E.D. Cal. 1987). Thus, virtually every court to consider the question has held that a joint tortfeasor's settlement of claims may properly act as a bar to its subsequent liability for contribution.[6] The Eleventh Circuit stands alone by holding

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[5] *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 529 (W.D. Okla. 1990) (quoting Thomas V. Harris, *Washington's Unique Approach to Partial Tort Settlements: The Modified Pro Tanto Credit and Reasonableness Hearing Requirement*, 20 Gonz. L. Rev. 69, 167 (1985)), *rev'd on other grounds*, 975 F.2d 695 (10th Cir. 1992).

[6] *See, e.g., Rufolo v. Midwest Marine Contractor, Inc.*, No. 92-1593, ___ F.2d ___, 1993 U.S. App. LEXIS 25013, at *11-*14 (7th Cir. Sept. 29, 1993); *Jiffy Lube*, 927 F.2d at 160; *FDIC v. Geldermann, Inc.*, 975 F.2d 695, 698 (10th Cir. 1992); *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1031-32 (2d Cir. 1992); *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1362-63 (2d Cir. 1991); *Miller v. Christopher*, 887 F.2d 902, 906-07 (9th Cir. 1989); *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990); *McDonald v. Union*

otherwise in *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 484 (1992) and *Boca Grande Club, Inc. v. Polackwich*, 990 F.2d 607 (11th Cir.), *cert. granted*, ___ U.S. ___, 62 U.S.L.W. 3241 (Sept. 28, 1993).

The Eleventh Circuit's assertion in *Great Lakes Dredge & Dock* that "rejecting the settlement bar rule has a slight disincentive effect upon settlements" is ridiculous. 957 F.2d at 1582. This "slight" disincentive would eliminate partial settlements. *See In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *Nelson*, 662 F. Supp. at 1334. "[N]o defendant would settle with [the plaintiff] if he was to find himself back in the suit as a third party defendant." *Sabre Shipping Corp. v. American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969). If there is no bar to contribution "then partial settlement of any federal securities case before trial is, as a practical matter, impossible." *Nucorp*, 661 F. Supp. at 1408. As the Ninth Circuit explained in *Franklin v. Kaypro Corp.*:

> "Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone foolish enough to settle without barring

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Carbide Corp., 734 F.2d 182, 184 (5th Cir. 1984); *Nelson*, 662 F. Supp. at 1334-35; *In re Nucorp Energy Sec. Litig.*, 661 F. Supp. 1403, 1408 (S.D. Cal. 1987); *TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F. Supp. 766 (D. Kan. 1993); *In re Washington Public Power Supply System Sec. Litig.*, 720 F. Supp. 1379, 1399-1401 (D. Ariz. 1989); *In re Washington Public Power Supply System Sec. Litig.*, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶94,326, at 92,144-45 (W.D. Wash. 1988); *Kirkorian v. Borelli*, 695 F. Supp. 446, 452-54 (N.D. Cal. 1988).

> contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."

Franklin v. Kaypro Corp., 884 F.2d 1222, 1229 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (quoting *Nucorp*, 661 F. Supp. at 1408); *accord TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602 (D. Kan. 1992), *motion for reconsideration denied*, 813 F.Supp. 766 (D. Kan. 1993).

Even the Eleventh Circuit cannot abide the consequences of a general holding that claims for contribution may not be barred. In *In re U.S. Oil & Gas Litig.*, 967 F.2d 489 (11th Cir. 1992), it limits *Great Lakes Dredge & Dock's* holding to maritime cases, *id.* at 494 n.3, recognizing "that bar orders play an integral role in facilitating settlement." *Id.* at 494. "Defendants buy little peace through settlement unless they are assured that they will be protected against codefendants' efforts to shift their losses through cross-claims for indemnity, contribution, and other causes related to the underlying litigation." *Id.*

Equitable considerations favor prompt compensation of tort victims and public policy favors simplification and settlement of litigation. With partial settlements, tort victims "who otherwise might have to wait many years are assured some immediate compensation; the settling defendants are able to free themselves from litigation and pursue more productive matters; and the scarce societal resources which might be consumed by increasingly expensive litigation can be put to other redeeming uses." *Nelson*, 662 F. Supp. at 1334-35. Justice Powell has aptly observed that "parties to litigation and the public as a whole have an interest – often an overriding one – in

settlement rather than exhaustion of protracted court proceedings."[7] Bars to contribution should be permitted in connection with the partial settlement of claims against joint tortfeasors.

3. The Interest Of Nonsettling Defendants May Be Protected By A Good Faith Hearing And Findings That A Settlement Is Reasonable

If nonsettling defendants are forced to pay plaintiffs anything it will be because a factfinder concludes they committed a tort and are jointly liable for the entire damage caused. Their own wrongful conduct is an unseemly basis for invoking a court's equitable jurisdiction, asking it to prevent partial compensation of their victims. The interest of nonsettling defendants – in ensuring against "collusive" settlements on unfair and unreasonable terms – can be adequately protected when claims for contribution are barred in connection with a partial settlement. Simple economic self interest should ensure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant. However, where it appears that a settlement may be collusive and unfair, a court can always require a good faith hearing where the likelihood of recovery, the settling defendant's ability to pay, and the roles of the several defendants in causing the harm suffered may be considered to ensure that the settlement is reasonable. *See, e.g., Miller v.*

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[7] *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring); *see also Marek v. Chesney*, 473 U.S. 1, 5 (1985); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1289 (9th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 408 (1992); *Nelson*, 662 F. Supp. at 1334-35.

Christopher, 887 F.2d 902, 907-08 (9th Cir. 1989); *TBG*, 811 F. Supp. at 604; *Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 263 (1985).

The notion that allowing a bar to contribution would encourage "collusive" settlements is misplaced. Exactly what constitutes "collusion" under such circumstances is not at all clear. However, the economic self-interest of plaintiffs should be enough to ensure that they seldom will settle for unreasonably small amounts. They are particularly unlikely to let the most culpable defendants out of a case for an unreasonably small payment, for the absence of such defendants decreases the likelihood of a favorable jury verdict and reduces the expectation that remaining defendants will be held jointly and severally liable for the wrongs committed.

The one situation in which plaintiffs are likely to settle with culpable defendants for an amount that is truly disproportionate with those defendants' relative fault arises when the settling defendants lack substantial insurance coverage or are close to insolvency. It certainly makes sense for a plaintiff to settle with a defendant for a small amount if that defendant lacks the assets to pay a substantial judgment. Under such circumstances the nonsettling defendants' interest in contribution itself likely amounts to little. The defendant who lacks the resources to pay a substantial judgment to the plaintiff also lacks the resources to pay a substantial amount in contribution.

4. This Court's Precedents Do Not Prohibit Bars To Contribution In Connection With Partial Settlements

This Court's holdings in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), and *Cooper Stevedoring Co. v. Fritz*

Kopke, Inc., 417 U.S. 106 (1974), do not prohibit contribution bar orders. *Cooper Stevedoring* recognizes an interest in contribution in admiralty, but it does not address whether contribution claims may be barred by a good faith settlement. *Reliable Transfer* also does not address the issue; rather, it holds that where two vessels collide, and both are at fault, principles of comparative negligence apply to adjudicate claims between them. It *does not* hold that principles of comparative negligence between defendants can control over the right of a victim of their joint tort to obtain compensation through partial settlements.

No precedent at this Court justifies a rule prohibiting bars to claims for contribution in connection with the partial settlement of a claim. The rule created in *Great Lakes Dredge & Dock* and applied by the Eleventh Circuit in this case is grossly inequitable to the victims of joint torts because it makes it virtually impossible for them to enter partial settlements of their claims when some but not all joint tortfeasors are willing to settle on favorable terms. This Court ought to reject the Eleventh Circuit's new rule, for the interest of allocational equity among wrongdoers is insufficient to overcome the equitable interest of assuring prompt compensation to their victim.

B. This Court Need Not And Should Not Reach The Question Of What Impact A Settlement Should Have On Plaintiffs' Claims

Once it is determined that settlement of claims may bar a settling defendant's liability for contribution, the question remains as to what effect the settlement and bar should have on the plaintiffs' claims against remaining defendants. Because a plaintiff who settles with one of

several defendants receives partial compensation for the loss suffered, it makes sense to reduce the liability of the remaining defendants accordingly. However there are a variety of approaches to determining how the reduction should be calculated. Plaintiffs might be subject to a *"pro tanto"* setoff, a *"pro rata"* setoff or a "proportionate fault" setoff against the plaintiffs' claims. *See infra* at 17-21. This Court should not reach the question because it is neither encompassed in the issue presented by the Petition for Certiorari nor necessary to its resolution. *See* Petition for Certiorari at i; *Boca Grande Club*, ___ U.S. ___, 62 U.S.L.W. 3241.

The Petition for Certiorari and Respondent's Opposition identify only one of several contribution bar rules, and the rule they agree on is extraordinarily unfavorable to the victims of joint torts.[8] Both parties before this Court agree that claims for contribution may be barred if this Court limits the claims of their joint victims, cutting off the victims' right to be made whole even though they are not represented before this Court.[9] This Court should

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[8] The Petition for Certiorari and Respondent's Opposition to it both suggest that if contribution is barred the nonsettling defendants may be entitled to a *"pro rata"* offset of liability. *See infra* note 9. What they call a *"pro rata"* reduction is really a proportionate fault reduction, a different contribution bar rule altogether. *See infra* at 17-21. In fact, the majority of the courts to address the question have adopted a third rule, holding that where contribution claims are barred by settlement the remaining defendants are entitled to a *pro tanto* set off of the amount of the settlement. *See infra* note 16.

[9] In its Petition for Certiorari, Boca Grande Club argued that this Court should adopt either (1) a rule barring contribution claims without regard to the effect on a plaintiffs' claims against nonsettling defendants, or (2) a rule that "eliminates contribution by reducing the plaintiff's claim by the pro rata

not adopt or endorse such a contribution bar rule in a case where the plaintiffs, whose claims will be harmed, are not represented before this Court.[10]

This Court's choice of a rule in this case would, in effect, adjudicate rights arising between the Respondents as nonsettling defendants, and the tort-victim plaintiffs in the underlying action *who are not even represented before this Court*. This Court's choice of a specific contribution bar rule would, moreover, have far reaching consequences beyond this case – and perhaps beyond the law of admiralty as well. The issue should be reserved for a case where it is squarely presented, and where the plaintiffs whose rights are affected are parties before this Court.

[*sic*] portion of the liability of the settling defendant." Petition for Certiorari at 5. In Respondent's Brief in Opposition to the Petition for Certiorari, Florida Power and Light took the position that where a joint tortfeasor settles the law should either (1) allow an action for contribution against the settling tortfeasor by any other tortfeasor who has paid more than his or her equitable share of the plaintiff's claim, or (2) "[r]educ[e] the claim of the plaintiff by the pro rata [*sic*] share of a settling tortfeasor's liability for damages." Respondent's Brief in Opposition at 5-6.

[10] The fact the parties before this Court agree that a contribution bar is appropriate, provided the claims of a party not before this Court are reduced, may even raise a question as to whether this Court's jurisdiction has been properly invoked. The fact that the parties before the Court agree on the resolution of this appeal may demonstrate "the absence of a genuine adversary issue between the parties." *United States v. Johnson*, 319 U.S. 302, 304 (1943). "[I]f one party agrees with the position taken by the other, there is no case or controversy within the meaning of Article III." Laurence H. Tribe, *American Constitutional Law* §3-12 at 93 (2d ed. 1988).

Considerable confusion surrounds even the terms used to describe alternative setoff rules – both in this litigation and elsewhere. While both the Respondent and Petitioner advocate a *"pro rata"* reduction of their victims' ultimate recovery, the reduction they actually describe is one based on proportional fault.[11] There are three basic approaches to this reduction of liability: (1) *pro tanto* reduction, (2) *pro rata* reduction, and (3) proportional reduction based on relative culpability.[12]

Under the *pro tanto* approach, any judgment against the remaining defendants will be reduced by the amount of the settlement itself. *See Jiffy Lube*, 927 F.2d at 160-61 & n.3; *TBG, Inc. v. Bendis*, 811 F. Supp. 596, 602-03 (D. Kan. 1992) *motion for reconsideration denied*, 815 F. Supp. 766 (D. Kan. 1993); *FDIC v. Geldermann, Inc.*, 763 F. Supp. 524, 527-28 (W.D. Okla. 1990), *rev'd on other grounds*, 975 F.2d 695 (10th Cir. 1992). The *pro tanto* rule applies in many states,[13] as well as under the Uniform Contribution

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[11] *See supra* note 9. Their confusion of terms probably stems from the Eleventh Circuit's misuse of the *"pro rata"* label to describe what is, in substance, a proportional fault reduction of liability in *Great Lakes Dredge & Dock*. *See* 957 F.2d at 1579.

[12] *See Jiffy Lube*, 927 F.2d at 161 n.3; *Geldermann*, 763 F. Supp. at 527-28; *In re Terra-Drill Partnerships Sec. Litig.*, 726 F. Supp. 655, 656-57 (S.D. Tex. 1989); *see generally* Harris, *supra* note 5, at 77-112. Seventh Circuit precedents refer to the *pro tanto* methodology as the "contribution plus settlement bar" approach, and refer to the proportionate fault methodology as the "claim reduction" approach. *See In re Oil Spill By the Amoco Cadiz*, 954 F.2d 1279, 1280-81 (7th Cir. 1992)..

[13] *See, e.g., Tech-Bilt, Inc. v. Woodward-Clyde & Assoc.*, 38 Cal. 3d 488, 492-93, 213 Cal. Rptr. 256 (1985); *Process Masters, Inc. v. Alpha III Ltd. Partnership*, 477 So. 2d 69, 69-70 (Fla. App. 1985);

Among Tortfeasors Act.[14] Congress adopted it to govern contribution bars for statutory liabilities under CERCLA,[15] and most federal precedents hold that where contribution claims are barred by settlement, the remaining defendants are entitled to a *pro tanto* setoff in the amount of the settlement.[16]

Bishop v. Klein, 380 Mass. 285, 294-95, 402 N.E.2d 1365, 1371 (1980); *Yost v. State*, 640 P.2d 1044, 1048 (Utah 1980); Cal. Civ. Proc. Code §§877, 877.6; Fla. Stat. Ann. §§768.041, 768.31(5); Ill. Rev. Stat. ch. 70 ¶302; Mass. Gen. L. ch. 231B §4; Wash. Rev. Code §4.22.060.

[14] Uniform Contribution Among Tortfeasors Act §4(a), 12 U.L.A. 57, at 98 (1975).

[15] In CERCLA, Congress provided that a defendant who enters a settlement with the United States or a State shall be immune to claims for contribution, and also provided that one defendant's settlement "reduces the potential liability of the others *by the amount of the settlement*." 42 U.S.C. §9613(f)(2) (emphasis added). "The law's plain language admits of no construction other than a dollar-for-dollar reduction of the aggregate liability." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 92 (1st Cir. 1990); *see City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. 340, 345-46 (D. Colo. 1993); *City of New York v. Exxon Corp.*, 697 F. Supp. 677, 681 n.5 (S.D.N.Y. 1988).

[16] *See, e.g., Rufolo*, ___ F.2d ___, 1993 U.S. App. LEXIS 25103, at *10-*14; *Rollins v. Cenac Towing Co.*, 938 F.2d 599, 600-01 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1242 (1992); *Singer*, 878 F.2d 596, 600 (2d Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990); *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209 (10th Cir. 1988); *Hernandez v. M/V Rajaan*, 841 F.2d 582, 591 (5th Cir.), *corrected on petition for rehearing*, 848 F.2d 498 (5th Cir.), *cert. denied*, 488 U.S. 981 (1988); *Miller v. Apartments & Homes of New Jersey, Inc.*, 646 F.2d 101, 109 (3d Cir. 1981); *TBG*, 811 F. Supp. at 602-05; *Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33 (W.D. Mo. 1991); *Geldermann*, 763 F. Supp. at 528-32; *MFS Municipal Income Trust v.*

Under the *pro rata* rule, the plaintiff's potential recovery against remaining defendants is based upon a *pro rata* reduction of damages that may be recovered from the remaining defendants. Thus, if there are four defendants and one settles, the plaintiff's potential recovery against the remaining defendants will be reduced by twenty-five percent. If there are ten defendants and one settles, the liability of remaining defendants will be reduced by one tenth, if two of the ten defendants settle, liability of the remaining defendants will be reduced by one fifth, and so on. *See Jiffy Lube*, 927 F.2d at 160-61 & n.3; *Geldermann*, 763 F. Supp. at 528; Harris, *supra* note 5, at 80-85.

Under the proportionate fault rule, defendants who refuse to settle are entitled to a reduction in liability based on the relative fault of the settling defendants – requiring the settling defendant's liability to be determined by a trier of fact even though they are no longer parties to the litigation. *See Jiffy Lube*, 927 F.2d at 160-61 & n.3; *TBG*, 811 F. Supp. at 603-05; *Geldermann*, 763 F. Supp. at 528, 529-30; Harris, *supra* note 5, at 98-105.

The issues involved in choosing among these rules are so complex that the authors of the *Restatement (Second) of Torts* refused to endorse a single rule, writing that "[e]ach has its drawbacks and no one is satisfactory." *Restatement (Second) of Torts* §886A, *Caveat & comment m.*

American Medical International, Inc., 751 F. Supp. 279, 281-86 (D. Mass. 1990); *Dalton v. Alston & Bird*, 741 F. Supp. 157, 159-60 (S.D. Ill. 1990); *Terra-Drill*, 726 F. Supp. at 656-57; *In re Atlantic Financial Sec. Litig.*, 718 F. Supp. 1012, 1017-18 (D. Mass. 1988).

The *Restatement* instead invites courts to apply either a *pro tanto* or proportionate fault setoff. *See id.* §885(3) *comment e.* Even the "Uniform Laws" are anything but uniform. The Uniform Contribution Among Tortfeasors Act originally provided for a *pro rata* setoff.[17] Because that rule discouraged partial settlements, the Act was amended and now provides for a *pro tanto* setoff.[18] The Uniform Comparative Fault Act, by contrast, recommends a proportionate fault setoff. *See Uniform Comparative Fault Act* §6, 12 U.L.A. 43, at 57 (Supp. 1993). Federal Courts attempting to adopt a "uniform national rule" have been unable to establish one.[19]

It could be argued that the method of offset should not be subject to a rigid universal rule at all. Some courts have found "no compelling reason why a uniform national rule would be necessary."[20] Thoughtful

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[17] *See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Ninth Annual Conference* 244-47 (1939) (§5 & *comment*).

[18] *See Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Annual Conference Meeting in Its Sixty-Fourth Year* 224 (1955); Uniform Contribution Tortfeasors Act §4(a), 12 U.L.A. 57, at 98 (1975).

[19] *Compare Kaypro*, 884 F.2d at 1228-32 (9th Cir. 1989) (establishing uniform national rule of proportional fault setoff) *with Singer v. Olympia Brewing Co.*, 878 F.2d 596, 599-600 (2d Cir. 1989) (establishing "uniform national rule" of *pro tanto* setoff), *cert. denied*, 493 U.S. 1024 (1990).

[20] *First Federal Sav. & Loan Ass'n v. Oppenheim, Appel, Dixon & Co.*, 631 F. Supp. 1029, 1036 (S.D.N.Y. 1986); *cf. Jiffy Lube*, 927 F.2d at 161-62 (remanding to district court for choice of setoff instead of adopting a universal rule); *Miller*, 887 F.2d at 906-07 (affirming *pro tanto* contribution bar where district court did not consider alternative of proportionate fault bar); *In re NBW Commercial Paper Litigation*, 807 F. Supp. 801, 809-10 (D.D.C. 1992) (suggesting choice of rules may depend on equities of the case).

commentators suggest that different rules should be applied on a case-by-case basis.[21] The best course may be to leave the matter to the discretion of the settling parties subject to the approval of the district court. Certainly, this is not an appropriate case in which to choose a single rule to govern all future cases.

1. Application Of The Several Contribution Bar Rules Raises Many Complicated Issues

The issues are complex, and the consequences are serious, in the choice among the several contribution-bar rules.

To illustrate the practical effects of the three rules, one may consider the case of a plaintiff who suffered total damages of $1 million as a consequence of three defendants' joint wrongdoing. If the plaintiff does not settle with any of them, and proceeds through trial to a favorable verdict, it will be able to collect the $1 million judgment from the defendant of its choice, leaving that defendant to pursue claims for contribution. If the plaintiff settles with an impecunious defendant who lacks insurance and can pay no more than $100,000, the three contribution bar rules will have radically different effects

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[21] *See* Lewis A. Kornhauser & Richard L. Revesz, *Settlements Under Joint and Several Liability*, (Oct. 6, 1993 Draft; publication forthcoming).

when the plaintiff proceeds to trial and obtains a favorable judgment against the nonsettling defendants.

With a *pro tanto* setoff, defendants who refuse to settle nonetheless obtain the benefit of any partial settlement entered – in the full amount the plaintiff actually receives from the settling defendant. Thus, in our hypothetical, a judgment of $1 million against the defendants who refused to settle would be reduced by the $100,000 received in settlement. The nonsettling defendants would pay $900,000 and the plaintiff – who already received $100,000 in partial settlement – would be made whole. The overall damages assessed against the joint wrongdoers is the injury they caused – $1 million – so that the liability imposed reflects the harm caused and joint wrongdoing is appropriately deterred.

Under a *pro rata* reduction rule, however, if the plaintiff settles with one of three defendants the judgment entered against the nonsettling defendants will be reduced *pro rata* – by one third – and the plaintiff will recover only $666,666.66 from defendants who refused to settle but are found liable at trial. Add to this the $100,000 received in partial settlement and the plaintiff recovers a total of only $766,666.66. Thus, a partial settlement under the *pro rata* rule may impose a tremendous penalty, depriving plaintiff of the right to be made whole – thereby discouraging settlement while reducing the deterrent effect of joint and several liability.

This penalty is an arbitrary one – for if the plaintiff had named ten defendants instead of three, the setoff would be only one tenth of the final judgment. The more defendants named, the lesser effect partial settlement with any of them has on the plaintiff's claims. *See supra* at

19. This may create a perverse incentive for plaintiff to name as many defendants as possible in order to reduce the effects of any partial settlements that are entered – encouraging tort victims to name as many marginal defendants as they can in any given case.

The effects of a proportionate fault reduction rule may be even worse. The *pro rata* reduction rule, at least, involves a simple mechanical calculation. The proportionate fault rule requires a finder of fact to calculate the relative culpability not just of the defendants who remain in the case, but of the defendants who settled the claims against them. The jury or other trier of fact is required to make findings regarding the liability of persons who are no longer parties to the litigation. The plaintiff must attempt to persuade the jury not only that the defendants before the jury committed a tort, but that the defendants who settled were not substantially at fault. The remaining defendants who refused to settle are free to point their fingers at an empty chair and to put on a case that shifts the blame from their own shoulders to those of a party who is not even present before the trial court. *See TBG*, 811 F. Supp. at 604; *In re Atlantic Financial Management, Inc. Sec. Litig.*, 718 F. Supp. 1012, 1018 (D. Mass. 1988).

Under the proportionate fault rule, settlement with some defendants does not simplify litigation. It makes litigation more complicated – greatly increasing the burden of the trial court. This is a truly perverse result which undermines the very public policy considerations that favor settlement. Adding to the jury's burden the task "of apportioning fault between absent and present defendants would obviate much of the advantage of partial settlement to the judicial system itself." *Atlantic Financial*, 718 F. Supp. at 1018. "The problems inherent in such a

process are obvious." *TBG*, 811 F. Supp. at 604. The burdens of administering such a system – of "figuring out how much fault belongs with each current and former defendant – are staggering." *Rufolo*, ___ F.2d at ___, 1993 U.S. App. LEXIS 25013, at *13.

When it comes to the rights of the victim of joint wrongdoing, the proportionate fault rule again may be even more deleterious than the *pro rata* rule is. If the settling defendant of limited means in our hypothetical was highly culpable the jury might determine it was fifty percent at fault. The judgment would then be reduced by half and the plaintiff would recover only $500,000.00 from the nonsettling defendants. Added to the partial settlement of $100,000, this would mean a total recovery of only $600,000.00 – that is $400,000 less than the injury suffered. Of course, if the plaintiff had refused to settle with anyone, it could have collected the entire $1 million judgment from any defendant – leaving that defendant to deal with any shortfall in contribution from impecunious joint tortfeasors.

Adding to its faults, the result under the proportionate fault reduction rule is unpredictable. Perhaps defendants who refuse to settle will be able to persuade the jury that parties not before the court were even sixty, seventy or eighty percent at fault. "Delaying final determination of the amount of the set-off deprives the plaintiff . . . of one of the chief inducements to settle: certainty." *Atlantic Financial*, 718 F. Supp. at 1018; *see Geldermann*, 763 F. Supp. at 529-30. Defendants armed with the "wild card" jury issue of the proportional fault of joint tortfeasors not present to defend themselves will also be less likely to settle. The only certainties under the proportionate fault rule are (1) that settlement is likely to

greatly complicate trial of the case and (2) that by settling with one of the defendants the plaintiffs forfeit the right to be made whole.

The penalty on settlement is unpredictable, but is likely to be severe. Moreover, because the proportionate fault rule will tend to reduce total recoverable damages, it can only reduce the deterrent effect of joint and several liability. Where victims of joint torts are deprived of the right to be made whole, joint tortfeasors are effectively freed of the deterrent burden of making them whole. Courts that have selected a proportionate fault rule to reduce defendants' liability generally *say* that they are doing so because it will enhance deterrence.[22] The true effect is exactly the opposite. You cannot enhance deterrence by reducing potential (and expected) penalties.

Of the three contribution bar rules, the *pro tanto* setoff may be the most equitable. The settling defendant avoids further liability, thereby encouraging settlement. The plaintiff retains the right to be made whole by recovering a total amount equal to the damages eventually assessed by a jury or other trier of fact. The *pro tanto* rule thus may better serve the public policy that wrongdoing should be deterred and its victims made whole. Defendants who do not settle receive a benefit in the form of a reduction of liability in the amount of the settlement itself.[23] These are matters this Court will want to consider

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[22] *See, e.g., Kaypro*, 884 F.2d at 1231 ("This approach satisfies the statutory goal of punishing each wrongdoer.").

[23] *See Cannons*, 889 F.2d at 92; *City and County of Denver v. Adolph Coors Co.*, 829 F. Supp. at 345-46; *Dalton*, 741 F.Supp. at 159-60; *Atlantic Financial*, 718 F.Supp. at 1017-18.

in a case where the effect of a settlement and contribution bar on plaintiffs' claims is squarely presented.

Some may worry that the *pro tanto* methodology could be unfair to nonsettling defendants or that it may encourage "collusive" settlement agreements – perhaps requiring a fairness hearing to ensure a partial settlement was entered in good faith.[24] However, the danger of "collusion" under a *pro tanto* rule is likely outweighed by the danger of collusion under the competing proportionate fault rule. Under the proportionate fault rule "[t]he nonsettling defendants could collude together against the plaintiff by agreeing to place all the blame on the settling defendants thereby reducing the plaintiff's judgment." *TBG*, 811 F. Supp. at 605; *see also Biben v. Card*, [1991-1992 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶96,512, at 92,332-33 (W.D. Mo. 1991); *MFS Municipal Income Trust v. American Medical International, Inc.*, 751 F. Supp. 279, 284 (D. Mass. 1990).

2. Contribution Bar Rules Which Deny Plaintiffs The Right To Be Made Whole Should Not Be Adopted In This Case

This Court should not, in any event, adopt either the *pro rata* or the proportionate fault rule in this case as a

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[24] *See, e.g. Miller*, 887 F.2d at 907-08; *TBG*, 811 F. Supp. at 605. A finding that the settlement is reasonable, and entered in good faith may be based on evidence that the amount paid in settlement is reasonable in light of the likelihood of recovery, the solvency of the settling defendant and, perhaps, the relative culpability among the defendants if the plaintiff's claims are proved at trial. *See TBG*, 811 F. Supp. at 605; *Tech-Bilt*, 38 Cal. 3d at 499, 213 Cal. Rptr. at 263.

universal rule to govern future partial settlements. By denying plaintiffs who settle the opportunity to be made whole, the *pro rata* and proportionate fault rules conflict with fundamental principles of tort law and admiralty:

> "Nothing is more clear than the right of a plaintiff, having suffered . . . loss, to sue in a common-law action all the wrong-doers, or any one of them at his election; and it is equally clear, that, if he did not contribute to [the injury], he is entitled to judgment in either case for the full amount of his loss."

Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 260 n.7 (1979) (quoting *The "Atlas"*, 93 U.S. 302, 315 (1876)); *accord Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 861 F.2d 1197, 1209-10 (10th Cir. 1988). This principle forecloses *any* contribution-bar setoff rule that deprives plaintiffs of the right to be made whole. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1316-17 (7th Cir. 1992); *Geldermann*, 763 F. Supp. at 529-30.

In *Edmonds* a longshoreman injured in an accident aboard a vessel sued the shipowner, but not his own employer – a stevedore contractor – who was immune to suit under a workers' compensation system that forbade suits by longshoremen against their employers and barred shipowners' claims for contribution from stevedores. *Edmonds*, 443 U.S. at 258. A jury found that the vessel was only 20% at fault, while the stevedore contractor was 70% at fault and the longshoreman plaintiff was 10% at fault. *Id.* Noting that claims for contribution were barred by statute – as if the stevedore contractor had been a settling defendant – the court of appeals reduced the longshoreman's award against the shipowner to the portion of the loss attributable to the

vessel's fault. *See Edmonds v. Compagnie Generale Transatlantique*, 577 F.2d 1153, 1155-56 (4th Cir. 1978) (en banc), *rev'd*, 443 U.S. 256, 268-73 (1979). This Court reversed, holding that a proportionate fault claim reduction was inappropriate because it both complicates litigation and reduces injured persons' recoveries. *Edmonds*, 443 U.S. at 268-73. The Court acknowledged the relative inequity – between joint tortfeasors – of requiring a person only 20% at fault to pay 90% of the damages, but it also observed that the disparity in what joint tortfeasors are required to pay has been tolerated since the creation of joint and several liability. *Id.* at 272.

The Court concluded that the principle of contribution among joint tortfeasors could not be applied to limit their victim's recovery:

> Contribution remedies the unjust enrichment of the concurrent tortfeasor [not called on to pay] and while it may sometimes limit the ultimate loss of the tortfeasor chosen by the plaintiff, it does not justify allocating more of the loss to the innocent employee, who was not unjustly enriched.

Edmonds, 443 U.S. at 272 n.30 (citation omitted).

The *pro rata* and proportionate fault setoff rules make sense only if the right to contribution among joint tortfeasors *does* "justify allocating more of the loss to the innocent" victim of a tort – but *Edmonds* indicates that it does not. *See Edmonds*, 443 U.S. at 272 n.30; *see also Oil Spill by the Amoco Cadiz*, 954 F.2d at 1316-17; *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1545-48 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

Because the right to contribution is derivative and equitable in character, it should not be applied in a fashion that prejudices the ability of victims of joint wrongdoing to be

made whole. "[T]he plaintiff should not be penalized for settling." *Hess Oil*, 861 F.2d at 1209.

IV. CONCLUSION

For the foregoing reasons the judgment of the Eleventh Circuit should be reversed. This Court should hold that claims for contribution may be barred in connection with the partial settlement of a case. It should not reach the question of what effect a partial settlement and contribution bar may have on the plaintiffs' claims. However, if it reaches this issue it should not adopt a "proportionate fault" or "*pro rata*" setoff as a universal contribution-bar rule.

DATED: November 8, 1993

Respectfully submitted,

WILLIAM S. LERACH
(Counsel of Record)
MILBERG WEISS BERSHAD
HYNES & LERACH
600 West Broadway, Suite 1800
San Diego, California 92101
Telephone: 619/231-1058

JONATHAN W. CUNEO
General Counsel
NASCAT
1301 K Street, N.W.
Suite 650, East Tower
Washington, D.C. 20005
Telephone: 202/789-3960

Counsel for Amicus Curiae, National Association of Securities and Commercial Law Attorneys (NASCAT)

No. 93-180

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOCA GRANDE CLUB, INC.,
Petitioner,

v.

FLORIDA POWER & LIGHT CO.,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, SUGGESTING REVERSAL

Warren B. Daly, Jr.
Counsel of Record

George W. Healy, III
120 East Baltimore Street
Baltimore, Maryland 21202-1643
(410) 685-1120

Attorneys for The Maritime Law Association of the United States, Amicus Curiae

Dated: November 9, 1993

QUESTIONS OF LAW PRESENTED

1. How Should a Plaintiff's Settlement with One Defendant Be Accounted For in Entering Judgment Against Other Defendants?

2. Should Either Settling or Non-Settling Defendants Be Permitted to Seek Contribution from the Other?

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* suggesting reversal of the decision below of the Court of Appeals. Both Petitioner and Respondent have consented to MLA's participation, and copies of the letters conveying such consent are being filed with the Clerk of the Court simultaneously with the submission of this brief.

INTEREST OF *AMICUS CURIAE*

MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899. It has a membership of about 3600 attorneys, federal judges, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is repre-

sented in that Association's House of Delegates.

MLA's attorney members, most of whom are specialists in admiralty law, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, stevedores, seamen, longshoremen, passengers, marine insurance brokers and underwriters and other maritime plaintiffs and defendants.

MLA's purposes are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association, and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives MLA, during the ninety-four years of its existence, has sponsored a wide range of legislation dealing with maritime matters, including the Carriage of Goods by Sea Act[1] and the Federal Arbitration Act.[2] MLA has also cooperated with congressional committees in the formulation of other maritime legislation.[3]

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[1] 46 U.S.C. §§ 1300-1315 (1988).

[2] 9 U.S.C.A. §§ 1-16 (West Supp. 1993).

[3] *E.g.*, 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376 (1988); implementation of the 1972 Convention for Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, *reprinted in* 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 (7th rev'd ed. 1993), *see* 33 C.F.R. ch. 1, subch. D, Special Note, at 161 (1992); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073 (1988).

MLA's Committee on Maritime Personnel appointed a subcommittee in 1988 to study the conflicting methods employed by federal courts in reducing judgments entered against one defendant to account for settlements reached by the plaintiff with other defendants, and the related rules governing contribution to or from settled defendants. That subcommittee represented the views of both plaintiffs and defendants. It submitted a report in the spring of 1990, endorsed by its parent committee, which recommended a set of rules which, for the most part, track the provisions of the Uniform Comparative Fault Act, 12 U.L.A. 43 (Supp. 1993) ("UCFA"). Subsequently, a resolution was unanimously adopted at the MLA Annual Spring Meeting on May 4, 1990, authorizing MLA sponsorship of legislation which would codify those rules.[4] As a result of MLA's further efforts, the Hon. Helen Delich Bentley introduced draft legislation on September 12, 1991. H.R. 3318, 102d Cong. 1st Sess. (1991). A copy of that Bill, referred to hereafter as "the MLA Bill," is reproduced in the appendix to the brief filed by MLA in this Court as *amicus curiae* in *McDermott, Inc. v. AmClyde, Inc.*, No. 92-1479.[5] MLA sought passage of "the MLA Bill" to obtain uniformity in this area of maritime law.[6]

The quest for uniformity in maritime law has long been of great importance to MLA. It has been repeatedly expressed by our membership and standing committees. For example, in

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[4] MLA Minutes, MLA Doc. No. 683 at 9625-28 (1990).

[5] That brief, including its appendix, is reproduced in full as an appendix to this brief.

[6] The Bill died in the House Judiciary Committee at the end of the last term. MLA is currently working with members and staff of that Committee with a view to reintroducing the Bill this term. Of course, the opinions in this case and in *McDermott, Inc. v. AmClyde, Inc.*, No. 92-1479, will likely have an impact on the need for the Bill, and thus further legislative action will probably await those opinions.

1975 the MLA Standing Committee on Uniformity of U.S. Maritime Law recommended that steps be taken to persuade congressional committees "that nationwide and, in fact, world-wide uniformity in the Maritime Law is highly desirable, not only from the standpoint of those involved with maritime commerce but from that of the public as well." A resolution to that effect was unanimously adopted at the MLA Annual Spring Meeting on April 25, 1975.[7] A substantially identical resolution was adopted by the American Bar Association in 1976. This policy has been reaffirmed by the MLA on several occasions, most recently in a 1986 resolution,[8] and it has often been expressed as well by this Court.[9]

It is the policy of MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved and the Court's decision may substantially affect the uniformity of maritime law and the future course of maritime litigation generally. Such a situation exists in this case. Application of differing rules related to contribution between settling and non-settling joint tortfeasors in maritime cases not only destroys uniformity of U.S. maritime law but also invites and endorses forum shopping and unpredictability in an area in which consistency is essential. Allowing a proliferation of chaotically different results in the same factual settings adversely affects the general viability of the doctrine of uniformity and consequently the practices of MLA's attorney members and the affairs of their clients.

MLA also has a strong interest in having substantive rules developed which promote admiralty's historic goal of equity.

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[7] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[8] MLA Minutes, MLA Doc. No. 669 at 8769 (1986).

[9] *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). *See also* Henry M. Hart, Jr., *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84, 148 (1959).

The rules set out in the MLA Bill are designed to be nonpartisan,[10] to furnish all maritime litigants with certainty respecting the mechanics of a settlement credit and to provide the judiciary with a workable solution to these difficult issues. Accordingly, MLA's Board of Directors voted, without dissent, to submit a brief as *amicus curiae* in *McDermott, Inc. v. AmClyde, Inc.*, No. 92-1479, not in support of either party, but in support of adoption by this Honorable Court of certain principles contained in the MLA Bill.

McDermott technically presented only the question of how to calculate the amount of the credit to which a non-settling defendant is entitled on account of the plaintiff's settlement with another defendant. MLA strongly urged this Court in its brief in *McDermott*, however, to consider and resolve concurrently the closely related question of whether a non-settling defendant may seek contribution from a settling defendant, or vice versa.[11] It is that very issue which is now presented to the Court in this case.

Because MLA explained in detail in its brief in *McDermott* not only how the credit would be calculated under the MLA Bill, but also the effect the MLA Bill would have on actions for contribution, MLA believes it is unnecessary to repeat that material in the body of this brief. Instead, MLA's brief herein will be very short, and will refer primarily to the impact that application of the rules contained in the MLA Bill would have on resolution of the claims presented herein. Adoption of those rules would require reversal of the opinion below.

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[10] *See* Paul S. Edelman, *The Federal Maritime Comparative Responsibility Act*, N.Y.L.J., Nov. 1, 1991, at 3. Mr. Edelman was the plaintiff representative on the MLA subcommittee which drafted the bill.

[11] See MLA brief in *McDermott*, Appendix at a-8 to a-10.

SUMMARY OF ARGUMENT

MLA's brief in *McDermott* advocates adoption of a proportionate credit, which would reduce a plaintiff's judgment by that percentage of the overall damages which equals the settling defendant's proportionate fault in causing the loss. The proportionate credit also eliminates the need for contribution claims between settling and non-settling parties in most situations, because the non-settling defendants pay their share of the plaintiff's loss, and not any part of the shares of settled defendants. In contrast, adoption of a *pro tanto* credit, as occurred in both *McDermott* and the instant case, would require the Court to examine contribution rights, since a maritime defendant paying more than its share of the plaintiff's recovery may generally seek contribution from a joint tortfeasor which has paid less than its share. Equity and judicial economy will be promoted by adoption of a proportionate settlement credit and the corollary bar to contribution claims.

ARGUMENT

I.
THE COURT SHOULD ADOPT THE PROPORTIONATE CREDIT AND CONTRIBUTION BAR FEATURES OF THE MLA BILL

In its brief in *McDermott*, MLA sets out the alternative methods for calculating credits and resolving contribution claims in the context of settlement by one of several joint tortfeasors.[12] MLA then advocates a solution, consistent with the MLA Bill, which would preclude actions for contribution by or against settled defendants in nearly all circumstances.[13]

[12] See Appendix at a-7.

[13] See Appendix at a-14 to a-15. Contribution would be permitted only when one defendant settles the plaintiff's entire claim, thereby buying the other defendants peace for a fair price.

Indeed, under the MLA proposal, there can be no basis for contribution, because non-settling defendants are never required to pay damages caused by the fault of a settled defendant, but always remain liable for all damages caused by *their* proportionate fault.

Adoption by this Court of the rules contained in the MLA Bill would require reversal of the opinion below, not necessarily because that case was wrongly decided,[14] but because it was based on the ill-conceived *pro tanto* credit methodology adopted in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). MLA adopts and incorporates herein its entire argument in *McDermott*, reprinted as an appendix to this brief.

[14] The court below merely followed the earlier Eleventh Circuit opinion in *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992), which held that a non-settling defendant exposed to damages in excess of its proportionate share by application of a *pro tanto* credit could seek contribution from a settled defendant which had paid less than its fair share. Adoption now of a proportionate credit would obviate the need to revisit *Tanker ROBERT WATT MILLER*. Suffice it to say here that the availability of contribution in the context of a *pro tanto* credit is a hotly debated issue on which disagreement exists within the MLA. While settlement bars are attractive, considerable doubt exists whether, in the context of a *pro tanto* credit, they can coexist with *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). See Appendix at a-17 to a-18. MLA hopes that the Court will not find it necessary to resolve that issue.

II.
CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Court of Appeals for the Eleventh Circuit and to adopt a proportionate settlement credit rule, together with a contribution bar, in accord with those provisions in the MLA Bill.

Respectfully submitted,

/s/ Warren B. Daly, Jr.

Warren B. Daly, Jr.
Counsel of Record

George W. Healy, III
120 East Baltimore Street
Baltimore, Maryland 21202-1643
(410) 685-1120

Attorneys for The Maritime Law Association of the United States, Amicus Curiae

Dated: November 9, 1993

APPENDIX

No. 92-1479

In The
Supreme Court of the United States
October Term, 1992

McDERMOTT, INC.,
Petitioner,

v.

AMCLYDE, A DIVISION OF AMCA INTERNATIONAL, INC. AND
RIVER DON CASTINGS, LTD.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, AS *AMICUS CURIAE*, SUGGESTING REVERSAL

Warren B. Daly, Jr.
Counsel of Record

George W. Healy, III
120 East Baltimore Street
Baltimore, Maryland 21202-1643
(410) 685-1120

Attorneys for The Maritime Law Association of the United States,
Amicus Curiae

Dated: August 20, 1993

QUESTIONS OF LAW PRESENTED

1. How should a plaintiff's settlement with one defendant be accounted for in entering judgment against other defendants?

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MLA also has a strong interest in having substantive rules developed which promote admiralty's historic goal of equity. The rules set out in the MLA Bill are designed to be nonpartisan,[8] to furnish all maritime litigants with certainty

[6] MLA Minutes, MLA Doc. No. 588 at 6397-98 (1975).

[7] MLA Minutes, MLA Doc. No. 669 at 8769 (1986). This Court has often expressed the same philosophy. *See, e.g., Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875). *See also* Henry M. Hart, Jr., *The Supreme Court, 1958 Term*, 73 Harv. L. Rev. 84, 148 (1959).

[8] *See* Paul S. Edelman, *The Federal Maritime Comparative Responsibility Act*, N.Y.L.J., Nov. 1, 1991, at 3. Mr. Edelman was the plaintiff representative on the MLA subcommittee which drafted the bill.

respecting the mechanics of a settlement credit and to provide the judiciary with a workable solution to these difficult issues. Accordingly, MLA's Executive Committee voted, without dissent, to submit this brief, not in support of either party, but in support of adoption by this Honorable Court of certain principles contained in the MLA Bill.[9] Adoption of those rules would require reversal of the opinion below.

SUMMARY OF ARGUMENT

When a plaintiff settles with one defendant and then proceeds to trial against others, some adjustment to account for the settlement must be made when entering judgment. Some courts, including the Court of Appeals below, have reduced the judgment by the dollar amount of the settlement. This is generally referred to as a *pro tanto* credit. Other courts have reduced the judgment by that percentage of the overall damages which equals the settling defendant's proportionate fault in causing the loss. This will be referred to herein as a "proportionate credit."[10]

[9] The case before the Court is a property damage case, to which the MLA Bill would not have applied *ex proprio vigore*. Maritime property damage litigation may involve complications or legal principles not typically encountered in personal injury claims. The impact here of McDermott's contract with AmClyde is an example of such a complication. Because settlement credit problems appeared to arise far more frequently in personal injury litigation, MLA decided to limit the scope of the MLA Bill to those cases. Identical credits have been applied to property damage claims, however, and the reasons for selecting a proportionate credit, discussed *infra*, would seem to apply equally to property damage. MLA's decision to submit this brief is based at least in part on concern that the rules announced in this case will be applied by lower courts in future personal injury litigation.

[10] Some courts have referred to such a proportionate reduction as a "*pro rata*" credit. MLA has consciously avoided use of that term to avoid confusion with "*pro rata*" credits applied in some states which reduce awards based on the numbers of settling and non-settling defendants.

Although no solution is perfect under all circumstances, the proportionate credit is superior in most respects. It is fair to all the litigants, because the parties to the settlement keep the benefit of their bargain and the non-settling defendants remain liable for that percentage of the plaintiff's damages caused by their own proportionate fault. Settlement is encouraged, because each defendant is able to weigh the extent of its own liability without regard to the impact of another party's settlement. Since the adequacy of settlements does not have to be determined, ancillary litigation is avoided. And a proportionate credit fully comports with the trend in maritime law towards pure comparative fault.

The proportionate credit also eliminates the need for contribution claims between settling and non-settling parties in most situations,[11] because the non-settling defendants pay their share of the plaintiff's loss, and not any part of the shares of settled defendants. Adoption of a *pro tanto* credit, however, would require the Court to examine contribution rights, since a maritime defendant paying more than its share of the plaintiff's recovery may generally seek contribution from a joint tortfeasor which has paid less than its share. Thus, contribution problems will be avoided, and equity and judicial economy will be promoted, by adoption of a proportionate settlement credit.

This case presents another opportunity for this Court to carry out its constitutionally mandated function of formulating admiralty and maritime guidelines in a way which will fairly encourage compromise and enable lower courts to adjudicate harmoniously the rights and liabilities of non-settling parties.

For example, if one defendant settled and two others were held liable at trial, such a "*pro rata*" credit would be one-third of the award, without regard to the amount paid in settlement or the relative culpability of the tortfeasors.

[11] A single exception is described in note 13, *infra*.

ARGUMENT

I.
INTRODUCTION

While other variations are possible, courts applying settlement credits in the maritime context have typically followed either the formulation set out in *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246 (5th Cir. 1979), or that announced in *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). *Leger* adopted the proportionate credit, under which non-settling defendants received a credit for that portion of the plaintiff's damages caused by the fault of the settling defendants. Stated conversely, the non-settling defendants in *Leger* were liable for that part of the plaintiff's loss caused by their combined negligence. *Self*, on the other hand, opted for a dollar-for-dollar or *pro tanto* credit, to be applied regardless of the proportionate fault of the settling and non-settling defendants.[12] The MLA Bill proposes a proportionate credit in accord with *Leger*.

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[12] The following hypothetical illustrates the problem now before the Court. Plaintiff ("P") brings an action against defendants A, B and C. P settles with A before trial for $25,000. At trial, fault is found in the following percentages:

P: 10%
A: 20%
B: 30%
C: 40%

P's damages are assessed at $100,000. How is the Court to account for P's settlement with A in entering judgment against B and C?

Under any credit, P would absorb 10% of the loss on account of his own contributory negligence. A *Leger* credit would be for A's 20% share of P's damages and would result in judgment being entered jointly and severally against B and C for $70,000, their combined 70% share of P's damages. Under *Self*, P's damages would be reduced first by his own

II.

THE AVAILABILITY OF CONTRIBUTION MUST BE CONSIDERED WHEN SELECTING A SETTLEMENT CREDIT MECHANISM

This case, in theory, presents only the question of how to calculate the amount of the credit to non-settling tortfeasors.[13]

10% fault and then by the $25,000 settlement. Thus, judgment would be entered against B and C jointly and severally for $65,000.

This example represents a favorable settlement by P. If P had received only $15,000 in settlement from A, under the same fault allocation the *Leger* credit would remain unchanged. Under *Self*, however, the judgment against B and C would be $75,000. This would represent an unfavorable settlement by P.

[13] The MLA Bill addresses the full range of problems associated with multi-party personal injury litigation which the Commissioners on Uniform State Laws had considered while creating the UCFA in 1977. Maritime scholars have advocated reference by admiralty courts to this draft legislation. *See* David R. Owen and J. Marks Moore, III, *Comparative Negligence in Maritime Personal Injury Cases*, 43 La. L. Rev. 941, 959 (1983).

The UCFA contained some provisions already well established in maritime law, such as proportionate reduction of the plaintiff's damages on account of contributory negligence. In addition to a proportionate settlement credit, the UCFA also precluded contribution in most circumstances. Contribution is permitted only when one defendant settles the plaintiff's entire claim, thereby buying the other defendants peace for a fair price. Finally, the UCFA offered rules for dealing with insurance offsets and non-paying defendants. The latter rule, known as "reallocation," appears in § 3(d) of the MLA Bill. The House Judiciary Committee has raised some concern about the inclusion of reallocation in the bill, due largely to its partisan impact, and its legislative future is uncertain. For that reason, and because reallocation is not before the Court, MLA is not now urging the Court to adopt, or to reject, the principles of § 3(d) of the MLA Bill. Indeed, MLA believes that the Court need not and should not address the issue in deciding this case. Debate over reallocation should properly await another day in another forum, when MLA's constituent member groups would be free to urge adoption of their respective positions.

That determination, however, is closely related to the rules governing contribution, also dealt with by the MLA Bill, § 5. Because the fairness of *pro tanto* and proportionate credits depends in part on the availability of contribution, and because the availability of contribution will always be an issue whenever a settlement is for an amount different from the settlor's proportionate fault, MLA urges the Court to announce a rule that, while formulating a credit methodology, also determines whether any defendant, either settling or non-settling, has a right to seek contribution.

The problems which arise from piecemeal resolution of these issues are well illustrated by the saga of *Self*. The Eleventh Circuit, reasoning that *Leger* had been undercut by *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), opted for the *pro tanto* credit. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. It gave conflicting signals, however, regarding the availability of contribution. While it stated initially that "contributions cannot be obtained by one tortfeasor from a tortfeasor who has settled with and had been released by the claimant," *id.* at 1547,[14] it later suggested twice that the non-settlor retained its right to seek contribution. *Id.* at 1556, 1557.

On remand, the district court did not permit contribution, but the Eleventh Circuit again reversed. *Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d 1575 (11th Cir.), *cert. denied*, 113 S. Ct. 484 (1992). Noting that this Court, in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), had established a system of loss allocation based on proportionate fault, it concluded that the *pro tanto* credit adopted in *Self* required it to reject the so-

[14] The Fifth Circuit cites *Luke v. Signal Oil & Gas Co.*, 523 F.2d 1190 (5th Cir. 1975), for this proposition. However, *Luke*'s contribution bar was determined under Louisiana law, and not federal maritime law.

called "settlement bar" rule and permit Great Lakes to pursue its contribution claim. 957 F.2d at 1582-83. Interestingly, the Eleventh Circuit opinion implies that the panel would have preferred to return to *Leger*. However, after stating that "*Edmonds* clearly does not overrule *Leger* directly," the panel noted that it was bound by the court's earlier opinion in *Self*. *Id.* at 1580 n.4.

If the Eleventh Circuit had analyzed the credit and contribution issues together initially, different rules might well have resulted. Instead, maritime defendants in the Eleventh Circuit are now unable to settle without being subject to claims for contribution by other defendants,[15] a result which has almost uniformly been condemned.[16] MLA urges this Court to dispel *Self*-type problems and retrospectives by considering, in the context of this litigation, both the form of the credit and the availability of contribution.

III.

THE COURT SHOULD ADOPT THE PROPORTIONATE CREDIT AND CONTRIBUTION BAR FEATURES OF THE MLA BILL

A number of federal courts have analyzed the relative merits of the *Leger* and *Self* credits,[17] although none has considered

[15] Theoretically, the settling defendant could secure an indemnity or hold harmless agreement from the plaintiff, thereby insulating it from further liability and trial expenses. Plaintiffs may be reluctant to give such assurances, however, and the current Eleventh Circuit rules are certain to have a chilling effect on the settlement process generally.

[16] An excellent discussion of contribution issues appears in *Miller v. Christopher*, 887 F.2d 902 (9th Cir. 1989), which approves a settlement bar without deciding which credit formula should prevail.

[17] *See, e.g., Matter of Oil Spill of the Amoco Cadiz*, 954 F.2d 1279, 1314-18 (7th Cir. 1992); *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266 (8th Cir. 1991); *In re The GLACIER BAY*, 1993 A.M.C. 1530 (D. Alaska 1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218 (S.D.N.Y. 1991). *See also* Graydon S. Staring, *Meting Out Misfortune: How the Courts Are Allotting the Costs of Maritime Injury in the Eighties*, 45 La. L. Rev. 907, 923-25 (1985) (advocating *Leger*).

the continuing viability of the *Self pro tanto* credit in light of the Eleventh Circuit's final conclusion that contribution rights must follow.[18] No formulation is free from criticism or able to protect litigants from perceived unfairness in every circumstance. Nonetheless, MLA is convinced that the *Leger* principles, as set out in the MLA Bill, offer by far the best and fairest framework for dealing with the issues.

A. *A Proportionate Credit Will Best Promote Fair Settlements*

The debate over *Self* and *Leger* credits has manifested disagreement about which method best encourages settlements. Each promotes settlement in some respects, but for differing reasons, not all worthy of endorsement.

Most of the inducement to settle arising from a *Self pro tanto* credit comes directly at the expense of fairness. Since the plaintiff will always recover in full if any non-settling party is liable at trial, there is little incentive for the plaintiff to act responsibly in negotiating settlements early in the litigation with other parties. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Some courts refer to the prospect of outright collusion. *See, e.g., McDermott, Inc. v. Iron*, 979 F.2d 1068, 1080 (5th Cir. 1992),

[18] An excellent and detailed analysis of *Self* appears in *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993). While within the Eleventh Circuit, the Alabama Supreme Court did not consider itself bound by *Self*, particularly in light of the conflict among the circuits. *Id.* at *6 n.1. Instead, it analyzed the alternatives, selecting the *Leger* approach as "the appropriate method for the disposition of maritime cases filed in Alabama state courts." *Id.* at *12.

cert. granted, 125 L. Ed. 2d 721 (1993); *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 221 (S.D.N.Y. 1991). It will be the non-settling defendant who bears the full brunt of any such agreement, without any opportunity to influence it. The only advantage of *Self* with a settlement bar to contribution is certainty. This Court, however, held in *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975), that certainty which was unfair could no longer be approved in maritime law. Moreover, now that the Eleventh Circuit has held contribution to be available from the settling defendant following a *Self* credit, any perceived inducement to settle has likely evaporated.

The impact of credit rules on the willingness of non-settling defendants to settle will also depend upon perceived equities and litigation strategy. Under *Self*, it is argued, the non-settling defendant knows exactly what its share will be, and therefore will be encouraged to settle. Sometimes, however, just the opposite occurs. A non-settling defendant who believes that other defendants have paid too much in settlement might become intransigent regarding settlement in the hope that the *pro tanto* credit will reduce its potential payment exposure, if not eliminate it altogether. Indeed, that might have occurred below. River Don was found at trial to be 38% responsible for damage to the deck. However, by going to trial and obtaining a *Self pro tanto* credit, it limited its liability to $470,000,[19] or about 22% of the damage to the deck. Therefore, the *pro tanto* credit in this instance may well have served to *discourage* settlement. It will undoubtedly have that effect in some cases.

[19] $2.1 million in damages reduced to $1.47 million by the 30% fault of McDermott and the sling defendants and then to $470,000 on account of the $1 million settlement. Theoretically, if the settlement of the "sling defendants" had been $1.5 million, River Don would have paid nothing! That result promotes neither settlements nor fundamental fairness.

Leger avoids the taint of unfairness and discourages legal gamesmanship without giving up the bar to contribution which promotes settlements. *See Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d 1266, 1271 (8th Cir. 1991); *Leger v. Drilling Well Control, Inc.*, 592 F.2d at 1250-51; *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. 218, 222-23 (S.D.N.Y. 1991). *But see Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992) (effect on settlements uncertain). The settlement process has always depended upon the ability of plaintiffs and defendants to assess with reasonable accuracy the size of the likely award. The normal balancing of litigation risks which occurs under proportionate fault promotes that process. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582. Moreover, several courts have recognized that proportionate loss allocation prompts bargaining which typically leads to *fair* settlements. *See United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975); *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Associated Elec. Co-Op v. Mid-America Transp.*, 931 F.2d at 1271; *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d at 1548. The proportionate credit, by eliminating the prospect for a litigant to hide behind someone else's settlement, and by holding all defendants responsible for their own fault, will ultimately encourage settlement by all parties.

B. *A Proportionate Credit Will Prevent Ancillary Litigation*

Judicial economy will be advanced through adoption of a proportionate credit joined with a settlement bar. Jurisdictions which now have *pro tanto* credits typically also provide for a hearing to determine whether a settlement was made in good faith and for adequate consideration.[20] If such a hearing

[20] California, for example, has such a rule, but federal courts have been reluctant to borrow such state law provisions in maritime cases. *See, e.g., Daughtry v. Diamond M Co.*, 693 F. Supp. 856 (C.D. Cal. 1988).

is to be meaningful and offer any hope of realistic protection for non-settling defendants, it would seem that a mini-trial of sorts would be required. That in turn requires discovery, raises the prospect of legal motions, and generally places putative settlors in exactly the position they sought to avoid. *See Great Lakes Dredge & Dock Co. v. Tanker ROBERT WATT MILLER*, 957 F.2d at 1582; *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1230 (9th Cir. 1989), *cert. denied*, 498 U.S. 890 (1990) (a securities case applying federal common law); *In re The GLACIER BAY*, 1993 A.M.C. 1530, 1535-36 (D. Alaska 1993). The alternative is a low threshold of inquiry in which courts will decline to analyze in detail the adequacy of any settlement thought to be arguably reasonable. Such review offers scant protection to non-settling defendants. The *Leger* proportionate credit avoids these problems by leaving the adequacy of a settlement exactly where it belongs: as a matter solely between the plaintiff and the settling defendant.[21]

The proportionate credit eliminates the basis upon which either settling or non-settling defendants might otherwise seek contribution from the other. The non-settling defendants, liable for no more than their proportionate share of plaintiff's damages, cannot satisfy the underlying premise of contribution that one tortfeasor paying more than his fair share may seek equitable relief from another paying less than his share.

[21] Adoption of a proportionate credit would effect further judicial economy in connection with an atypical aspect of this case. No determination was made at trial of the separate degrees of fault of plaintiff McDermott and the settling "sling defendants." A *Self pro tanto* credit should be applied against plaintiff's damages, reduced only by the plaintiff's own contributory fault. It appears that the result below also may have reduced the damages by the degree of fault of the settling defendants *before* applying the settlement credit. That, of course, would constitute a double reduction. Application of a proportionate credit makes this inquiry unnecessary, since the proportionate credit is for the *combined* fault of the plaintiff and the settling defendants.

Similarly, settling defendants who paid too much will have no claim against non-settling defendants, because they will not have paid less than their fair share. Of course, contribution will remain available among two or more non-settling defendants found liable to the plaintiff.[22]

The proportionate credit has not been immune from criticism that it requires ancillary litigation. Those criticisms, however, are unjustified. The Seventh and Eleventh Circuits have pointed to perceived problems in determining the share of the settled party. *See Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318; *Ebanks v. Great Lakes Dredge & Dock Co.*, 688 F.2d 716 (11th Cir. 1982). Litigants, however, have always had to deal with the fault of non-parties. A defendant will often argue that some party not present was the *real* cause of the accident.[23] In such circumstances, the conduct of all the players is before the jury. Asking them to determine the proportionate fault of an absent party whose conduct has been proven at trial will not create additional difficulty. Moreover, since the plaintiff has voluntarily agreed to settle with a party, it could clearly have arranged with that party to make key witnesses available as a part of the bargain. Thus, any inferred burden on plaintiffs is largely illusory. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 223-24.

Another suggested administrative reason not to apply *Leger* is a perceived inefficiency, from the standpoint of both time and money. The *Amoco Cadiz* court suggested that *Leger*

[22] In the hypothetical, *supra* note 12, if plaintiff collected his entire $70,000 judgment from B, B would in turn have an action for contribution against C for C's "equitable" share of $40,000.

[23] This is particularly true in longshore personal injury litigation. While the stevedoring company is statutorily immune from contribution claims, the shipowner is free to argue that the stevedore's fault was the sole proximate cause of the accident, thereby seeking to escape liability itself. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 265 n.15 (1979).

would require additional litigation since the settled party had not participated. 954 F.2d at 1317-18. The court's comment was probably due in part to frustration over the size and complexity of that particular litigation. Few cases will equal it. Thus, the *Amoco Cadiz* litigation is a poor foundation for the creation of policy for the average case. Moreover, it is not clear exactly what additional litigation would be required. The plaintiff's claims could be reduced under *Leger* without the need to involve the settled party. The burden would be on the non-settlors to prove fault of the settled party, so no inequity to the plaintiff should result. Interestingly, even the *Self* court describes *Leger* as "efficient." 832 F.2d at 1548.

C. *A Proportionate Credit Will Promote Fundamental Fairness*

An essential feature of settlement credit rules should be fairness to *all* of the litigants. The proportionate credit is far superior to the *pro tanto* credit in this respect. The parties to the settlement should have no complaint, for they will have received exactly that for which they bargained. Moreover, the plaintiff will usually have received the settlement proceeds relatively early in the proceedings, and the settling defendant will have avoided contribution exposure and further litigation of that issue. Non-settling defendants may not complain, because under *Leger* they remain responsible only for their share of the plaintiff's loss, no more and no less.

While *Leger* serves to avoid outright collusive settlements, it also avoids the *appearance* of collusion and the myriad situations in which a non-settling defendant might otherwise be complaining to the court of a settlement tactically structured to the non-settlor's disadvantage. This case provides an illustration. While the opinion below notes, 979 F.2d at 1080, that the settlement was not allocated between damage to the deck and damage to the crane until *after* the verdict, McDermott

and the "sling defendants" might have allocated the settlement in advance of trial, either sealing the allocation with the court or disclosing it to all parties. Because other maritime theories suggested that the sling defendants alone might be liable for damage to the crane,[24] the settlement might logically have allocated most, if not all, of the settlement proceeds to crane damage. Such a pre-trial allocation might have received a more receptive review below. Had it been embraced by the court, the amount of River Don's credit would clearly have been reduced significantly. But that credit should not logically depend on factors controlled solely by the parties to the settlement. Under *Leger*, the allocation would be irrelevant. River Don would be responsible for its proportionate share of damage to the deck, regardless of how McDermott and the sling defendants allocated their settlement. Fundamental fairness requires that result.

D. *A Proportionate Credit Will Further the Trend in Maritime Law Toward Pure Comparative Fault*

A *Self pro tanto* credit, when combined with a bar to contribution, runs head first against the proportionate loss allocation principles of *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974), and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 408 (1975). A non-settling tortfeasor, like Great Lakes Dredge & Dock Co. in *Self*, will be required to pay more than its proportionate share of the plaintiff's damages without being permitted a right of contribution against a joint tortfeasor who settled for less than its fair share. *Cooper Stevedoring* and *Reliable Transfer* simply do not permit such a result. From a legal standpoint, *Leger*'s

[24] AmClyde was protected from liability for crane damage by its contract with McDermott, and River Don was protected by the damage principles announced in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). 979 F.2d at 1077-78.

greatest strength is its harmony with *Cooper Stevedoring* and *Reliable Transfer*.

While *Self* interpreted *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), 269-70, as precluding *Leger*'s proportionate fault credit for settlements, 832 F.2d at 1546-47, that analysis failed to comprehend or take into account the narrow context in which *Edmonds* arose. While recognizing that some inequity to shipowners resulted, 443 U.S. at 269-70, the *Edmonds* Court felt obligated not to interfere with the "delicate balance" between shipowners, stevedoring companies and longshoremen which existed under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905 (1988). 443 U.S. at 273. No such "delicate balance" is presented in the settlement credit context. *Edmonds* did not address settlement issues. Furthermore, settling defendants typically enjoy none of the statutory immunities so important to the decision in *Edmonds*.

Edmonds is also invoked for the proposition that *Leger* improperly creates the risk that a plaintiff will recover less than full damages. *See, e.g., Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d at 1318. It is true that a plaintiff may accept less from a settling defendant than that defendant's share of the damages is subsequently determined to be. However, the converse is also true—a plaintiff may obtain a favorable settlement above what the settling party's share is later worth. Permitting the plaintiff to keep the benefit of his bargain is no more a double recovery than any "shortfall" resulting from a bad settlement would be a contravention of the *Edmonds* policy of full compensation.[25] *Leger* explained that no double

[25] In *Amerada Hess Corp. v. Owens-Corning Fiberglass Corp.*, Nos. 1911251, 1911252, 1993 WL 154448 (Ala. May 14, 1993), the court discussed "the perceived tension between Leger and Edmonds," concluding that no such tension need exist. *Id.* at *10-*11. Another excellent discussion of the "tension between *Edmonds* and *Reliable Transfer*" appears in *Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222.

recovery would occur because settlement dollars, obtained at a time of uncertainty, cannot be equated with damages at trial. 592 F.2d at 1249-50, 1250 n.10. Every settlement necessarily presents the risk that a defendant may have paid too much and the plaintiff may have accepted too little. But that is no reason not to promote settlements. Indeed, acceptance of a known, sure recovery at the expense of an uncertain, but possibly greater recovery at trial is the very essence of settlement.

Settlements are entered into willingly with the expectation that a party's interests will thereby be served. Surely it cannot be doubted that a plaintiff could settle his claim while the jury was deliberating for a lesser amount than the jury was prepared to award without offending the court's sense of fairness to the plaintiff. The same principle applies to earlier, partial settlements. *See Stanley v. Bertram-Trojan, Inc.*, 781 F. Supp. at 222-24. Accordingly, *Edmonds* does not require rejection of a *Leger* credit. *See id.* at 224. *See also* Evan T. Caffrey, Comment, *Holding the Bag-Proportional Fault and the Non-Settling Defendant: Self v. Great Lakes Dredge & Dock Co.*, 14 Tul. Mar. L. J. 415, 420-22 (1990).

IV.
IT IS ENTIRELY APPROPRIATE FOR THE COURT TO FASHION THESE RULES, AND NOT DEFER TO CONGRESS

The constitutional grant of admiralty and maritime jurisdiction is to federal courts, in Article III. No other field of substantive law was the subject of such treatment. From the beginnings of the nation, this Court has been the leading promulgator of rules for maritime loss apportionment.[26] That

[26] For an excellent dissertation of judicial development of this topic, *See* Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Cal. L. Rev. 304 (1957).

role has flourished in the last two decades with the opinions in *Cooper Stevedoring Co. v. Fritz Kopke, Inc.*, 417 U.S. 106 (1974) and *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975). Here, as there, Congress has not spoken. Thus, reference to legislative policy is not appropriate here, as it was in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). Moreover, the issues presented herein are particularly appropriate for judicial determination, inasmuch as they concern the mechanics of maritime trials and settlement of maritime claims.

The lofty tradition of this Court's historical role as the primary framer of maritime law, as evidenced by such opinions as *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), was recently discussed by the late, renowned admiralty jurist, The Hon. John R. Brown. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. Mar. L. & Comm. 249 (1993). This case provides a particularly apt opportunity for this Honorable Court to exercise its formative role, established by the United States Constitution, in development of the general maritime law of the United States.

V.
CONCLUSION

We most respectfully urge this Honorable Court to reverse the decision of the Court of Appeals for the Fifth Circuit and to adopt a proportionate settlement credit rule, together with a contribution bar, in accord with those provisions in the MLA Bill.

Respectfully submitted,

/s/ Warren B. Daly, Jr.
Warren B. Daly, Jr.
Counsel of Record

George W. Healy, III
120 East Baltimore Street
Baltimore, Maryland 21202-1643
(410) 685-1120

Attorneys for the Maritime Law Association of the United States,
Amicus Curiae

Dated: August 20, 1993

APPENDIX

102D CONGRESS—1ST SESSION
H.R. 3318

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

IN THE HOUSE OF REPRESENTATIVES
SEPTEMBER 12, 1991

MRS. BENTLEY introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

To clarify and make uniform the maritime law of the United States with respect to the recovery and allocation of compensatory damages.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Maritime Comparative Responsibility Act".

SEC. 2. EFFECT OF CONTRIBUTORY FAULT.

(a) Any contributory fault chargeable to a claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault but does not bar recovery.

(b) Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

SEC. 3. APPORTIONMENT OF DAMAGES.

(a) In an action involving fault of more than one party to the action, the court, unless otherwise agreed by all parties, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings, indicating—

(1) the amount of damages each claimant would be entitled to recover if contributory fault is disregarded;

(2) the percentage in which the contributory fault, if any, of each claimant has contributed to causing that claimant's injury; and

(3) the proportionate relationship of the fault of each of the other parties to each claim.

For this purpose the court may determine that two or more persons are to be treated as a single party.

(b) In determining the proportionate degree of fault of each party to an action, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.

(c) The court shall determine the award of damages to each claimant in an action in accordance with the findings, subject to any reduction under section 7, and enter judgment

jointly and severally against each party liable. For purposes of contribution under sections 5 and 6, the court also shall determine and state in the judgment each party's share of the judgment of each claimant in accordance with their respective proportionate fault.

(d) Upon motion made not later than one year after judgment is entered in an action, the court shall determine whether all or part of a party's share of a judgment is uncollectible from that party, and shall reallocate any uncollectible amount among the other parties to the action, including a claimant at fault, according to their proportionate fault. The party whose liability is reallocated is nonetheless subject to contribution and to any continuing liability to the claimant on the judgment.

SEC. 4. SET-OFF.

A claim and counterclaim shall not be set off against each other, except by agreement of both parties. On motion, however, the court, if it finds that the obligation of either party is likely to be uncollectible, may order that both parties make payment into court for distribution. The court shall distribute the funds received and declare obligations discharged as if the payment into court by either party had been a payment to the other party, and any distribution of those funds back to the party making payment had been a payment to that party by the other party.

SEC. 5. RIGHT OF CONTRIBUTION.

(a) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury or death, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose. The basis for contribution is each person's proportionate share of a claimant's recovery, as determined in accordance with section 3.

(b) A person who enters into a settlement with a claimant has a right to contribution from other persons only (1) if the liability of the person against whom contribution is sought has been extinguished by the person seeking contribution and (2) to the extent that the amount paid in settlement was reasonable.

(c) This Act does not affect any rights of or to indemnity which otherwise exist.

SEC. 6. ENFORCEMENT OF CONTRIBUTION.

(a) If the proportionate fault of the parties to a claim for contribuion has been established previously by the court, as provided by section 3, a party paying more than that party's proportionate share of the common liability shall, upon motion, be entitled to a judgment for contribution.

(b) If the proportionate fault of the parties to the claim for contribution has not been established by the court, contribution may be enforced in a separate action, whether or not a

judgment has been rendered against either the person seeking contribution or the person from whom contribution is being sought.

(c) If a judgment has been rendered, the action for contribution shall be commenced within one year after the judgment becomes final. If no judgment has been rendered, the person bringing the action for contribution either must have—

(1) extinguished the common liability within the period of the statute of limitations applicable to the claimant's right of action against the person from whom contribution is sought and commenced the action for contribution within one year after payment, or

(2) agreed while the action was pending to extinguish the common liability and, within one year after the agreement, have done so and commenced an action for contribution.

SEC. 7. EFFECT OF RELEASE.

A release, covenant not to sue, or similar agreement entered into by a claimant and a person alleged to be liable for that claim—

(1) discharges that person from all liability for contribution,

(2) does not discharge any other persons alleged to be liable for the same claim unless it so provides, and

(3) reduces the claim of the releasing claimant against other persons by the amount of the released person's proportionate share of any common liability, as determined in accordance with the provisions of section

SEC. 8. APPLICATION.

This Act applies to any action for personal injury or death, or both, arising out of a maritime tort which occurs on or after the date of the enactment of this Act.

SEC. 9. DEFINITIONS.

In this Act—

(1) the term "fault" includes—

(A) acts or omissions that are in any measure negligent or reckless toward the person of the actor or others, or that subject a person to strict tort liability; and

(B) breach of warranty, misuse of a product for which a defendant otherwise would be liable, and unreasonable failure to avoid an injury or to mitigate damages;

(2) the term "injury" includes—

(A) personal injury to a claimant; and

(B) death of a claimant's decedent; and

(3) the term "party" includes all defendants, third-party defendants, and persons who have been released from liability under section 7.

No. 93-180

In the Supreme Court of the United States

OCTOBER TERM, 1993

BOCA GRANDE CLUB, INC.,

Petitioner

v.

FLORIDA POWER & LIGHT COMPANY, INC.,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ARTHUR ANDERSEN & CO., COOPERS & LYBRAND, DELOITTE & TOUCHE, ERNST & YOUNG, KPMG PEAT MARWICK, AND PRICE WATERHOUSE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Of Counsel:

JON N. EKDAHL
General Counsel
Arthur Andersen & Co.

HARRIS J. AMHOWITZ
General Counsel
Coopers & Lybrand

HOWARD J. KRONGARD
General Counsel
Deloitte & Touche

EDWIN D. SCOTT
General Counsel
KPMG Peat Marwick

ELDON OLSON
General Counsel
Price Waterhouse

KATHRYN A. OBERLY*
Associate General Counsel
CARL D. LIGGIO
General Counsel
Ernst & Young
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 663-9871

* *Counsel of Record*

QUESTION PRESENTED

Whether — in a multi-defendant case in which some but not all defendants settle with the plaintiff — the settling defendants automatically are entitled to an order precluding nonsettling co-defendants from asserting contribution claims against them, or whether such a "bar order" is permissible only when the effect of the settlement on any verdict subsequently rendered against the nonsettling defendants is to reduce that verdict by an amount equal to what the nonsettling defendants would have been entitled to obtain in contribution.

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INTEREST OF THE AMICI CURIAE

The amici curiae are professional firms engaged in the practice of accountancy. They are the six largest firms of independent accountants in the United States, reporting, collectively, on the financial statements of more than 90 percent of those companies whose securities are publicly traded in the United States.

The Securities Act of 1933 and the Securities Exchange Act of 1934 require all public companies whose securities are registered with the Securities and Exchange Commission to

have their financial statements examined by independent public accountants. See 15 U.S.C. § 77aa (Schedule A) (25)-(27); *id.* § 78*l*(b)(1)(J)-(K). When a registrant or its officers and directors are sued under the federal securities laws, including Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, on the claim that statements issued by the registrant were fraudulent, the registrant's independent accountants frequently are joined as defendants on the basis of allegations that financial statements they audited contained material misstatements or omissions. Independent accountants are therefore almost always named as one of a group of defendants when they are sued in private actions under Section 10(b); indeed, they increasingly have been targeted by plaintiffs as a "deep pocket" in such cases. The availability of a contribution claim in suits under Section 10(b) is for that reason especially important to amici.

This Court recently reaffirmed that contribution among jointly liable defendants is available in private actions under Section 10(b). See *Musick, Peeler & Garrett* v. *Employers Insurance of Wausau*, 113 S. Ct. 2085 (1993). In the Section 10(b) context, lower courts have reached varying conclusions regarding the propriety of contribution bar orders like the one sought by petitioner in this case. Compare *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (holding that order barring contribution claims may be issued only when settlement credit equals what nonsettling defendant would be entitled to recover under contribution standard), cert. denied, 498 U.S. 890 (1990), with *TBG Inc.* v. *Bendis*, 811 F. Supp. 596, 602-604 (D. Kan. 1992) (barring contribution claims where settlement credit was limited to the amount of the settlement), appeal pending, No. 93-3130 (10th Cir.). Because the Court's decision in this admiralty case may shed light on the district courts' power to enter bar orders in private actions under federal statutes such as Section 10(b), and because amici have had considerable practical experience

with this issue in the Section 10(b) context, amici believe that their views on the question presented may be of assistance to the Court's consideration of this case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Whenever a plaintiff enters into a settlement with one — but not all — of the defendants in a case, two related questions invariably arise regarding the effect of the settlement upon the rights of the nonsettling co-defendants that remain. First, how will the settlement affect any judgment rendered in favor of the plaintiff and against the nonsettling defendants? Second, how will the settlement affect contribution claims that the nonsettling defendants have asserted, or might assert, against the settling defendant?

The first of these questions is now before the Court in *McDermott, Inc.* v. *AmClyde*, No. 92-1479 (to be argued Jan. 11, 1994). That case requires the Court to determine how any judgment ultimately rendered against the nonsettling defendants in an admiralty case should be reduced to take account of the settlement paid to the plaintiff. There are two basic approaches. Under the "pro tanto," or dollar-for-dollar, standard, the settlement amount is subtracted from the total liability determined at trial and the nonsettling defendants are liable for the remainder. Under the competing "proportionate credit" rule, any judgment on the plaintiff's claim against the nonsettling defendants is reduced by the share of liability allocated to the settling defendants by the trier of fact. The plaintiff may recover from nonsettling defendants only the share of the total liability allocated to those defendants.

The present case concerns the effect of a partial settlement on contribution claims among defendants in

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court. See Sup. Ct. R. 37.3.

admiralty actions. Again there are several competing approaches. One holds that an order barring contribution claims against the settling defendant should be issued in any case in which it is requested; another that such an order is permissible only if the settlement credit is calculated by the proportionate share method; and a third that a bar order is proper if the district court holds a hearing and determines that the settlement is "fair."

Although this case and *McDermott* involve claims in admiralty, these two questions regarding the effect of partial settlements arise with great frequency in all types of litigation involving federal causes of action. Indeed, federal courts have wrestled with these issues in contexts ranging from admiralty to ERISA to CERCLA to private actions under Section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5.[2] Thus, while admiralty supplies the backdrop for the Court's consideration of the matter, the decision here may well have implications for litigation involving numerous claims under a wide variety of federal statutes.

In our view, the Court cannot — and should not — address the particular question in this case in a vacuum. Rather, resolution of the contribution bar issue is inextricably linked with the Court's determination of the proper settlement credit in *McDermott*. If the Court in *McDermott* endorses the proportionate credit rule, which would in effect give the nonsettling defendant precisely what it is entitled to obtain in contribution under this Court's decision in *United States* v.

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[2] See *Lumpkin* v. *Envirodyne Indus.*, 933 F.2d 449, 464 (7th Cir.) (ERISA), cert. denied, 112 S. Ct. 373 (1991); *Environmental Transp. Systems* v. *Ensco, Inc.*, 969 F.2d 503, 507-510 (7th Cir. 1991) (CERCLA); *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222, 1231 (9th Cir. 1989) (adopting proportionate credit rule for actions under federal securities laws), cert. denied, 498 U.S. 890 (1990).

Reliable Transfer Co., 421 U.S. 397 (1975), a bar order would be permissible because the order would not trench upon the nonsettling defendant's contribution right. Indeed, a contribution action would be unnecessary in that situation because the nonsettling defendant would be assured that it would not have to pay any portion of the settling defendant's share of any ultimate judgment. If, on the other hand, the Court adopts the pro tanto credit approach, bar orders should not be permitted for several reasons.

Most fundamentally, the effect of such an order would be to allow the settling defendant to shift its liability to the nonsettling defendant, suddenly would be deprived of its right to obtain contribution for any payment to the plaintiff in excess of its own proportionate share (and, by virtue of the settlement, the nonsettling defendant would be almost certain to pay more than its share because it would have to make up any part of the settling defendant's share not covered by the settlement). There simply is no policy reason for giving the settling defendant and the plaintiff the unfettered power to increase the liability of the nonsettling defendant in this manner. Indeed, this shift of liability will thwart the policies of fairness and appropriate deterrence that the contribution remedy is designed to protect.

Proponents of this approach argue that contribution bar orders are essential because no defendant will enter into a settlement without that protection. But this Court already has recognized that "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer*, 421 U.S. at 408. The patent unfairness that would result from barring contribution claims requires rejection of that approach. And the "compromise" solution of barring contribution upon a finding that any settlement was reached in "good faith" is untenable because that process would protect the nonsettling defendant against a shift of liability only if the district court undertook a full evidentiary hearing

regarding the parties' relative culpabilities, the possible size of the verdict, and the strengths and weaknesses of the parties' cases — in effect a miniature trial before the trial.

If contribution bar orders are necessary to the settlement process, the answer is not to sacrifice the contribution rights of the nonsettling defendants. The appropriate resolution is to adopt the proportionate credit rule, which protects the rights of all parties.

ARGUMENT

A CONTRIBUTION ACTION AGAINST A SETTLING DEFENDANT MAY BE BARRED ONLY IF THE SETTLEMENT CREDIT IS EQUAL TO WHAT THE NONSETTLING CO-DEFENDANT WOULD HAVE BEEN ENTITLED TO OBTAIN IN CONTRIBUTION

This case involves a scenario that courts frequently encounter in cases involving multiple defendants: one or more defendants settle with the plaintiff before trial and then seek a court order barring the nonsettling co-defendants from asserting a contribution claim against those that have settled.[3]

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[3] These bar orders typically state: "[a]ll claims for contribution and/or indemnity that have been, or could be, asserted against the settling parties by any party to this action are barred and the future filing of such claims is hereby enjoined." *Federal Deposit Insurance Corp.* v. *Geldermann, Inc.*, 763 F. Supp. 524, 532 (W.D. Okla. 1990). In some cases, however, settling parties propose language for the bar order that is overbroad, potentially precluding causes of action against the settling defendants other than claims for contribution or indemnity arising out of the claim that is the subject of the settlement. See, *e.g.*, *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1024 (2d Cir. 1992) (settlement conditioned on "procurement of a final judicial order 'dismissing with prejudice and equitably barring all claims that are or could be asserted, now or in the future, against any Settling Defendant by any nonsettling defendant . . . arising out of' the subject matter of the * * * litigation"). Such overbroad language could prevent a nonsettling defendant from suing a settling defendant on a claim that is not derivative of the plaintiff's action, and therefore should not be affected by the settlement between the plaintiff and the settling defendant. Accordingly, if this Court concludes that bar orders are permissible, it should instruct the lower courts to take care that the scope of such orders is carefully circumscribed — as in the order from *Geldermann* set forth above — to reach *only* contribution claims arising out of the settled claim.

The starting point in determining the circumstances in which such an order may be issued is the nature of the contribution right itself.

"Typically, a right to contribution is recognized when two or more persons are liable to the same plaintiff for the same injury and one of the joint tortfeasors has paid more than his fair share of the common liability." *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 87-88 (1981). Contribution is designed to ensure that the liability is fairly allocated among two or more wrongdoers.

This Court reaffirmed the general right to contribution in admiralty cases in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), observing that "admiralty doctrine of ancient lineage" required "mutual wrongdoers" to share responsibility for paying for the damage that they inflicted. *Id.* at 110. The Court found that the principle that all parties at fault must share responsibility for paying the damages is justified by both the interest in fairness — so that a plaintiff could not "force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame" — and "[t]he interests of safety," because sharing the loss will make each party "'more careful.'" *Id.* at 111 (citation omitted).

The question in this case is whether a court may issue an order eliminating one defendant's right to contribution simply

because another defendant has entered into a settlement agreement with the plaintiff. We submit that such an order is proper only if the nonsettling defendant's contribution right is protected by other means, such as the proportionate settlement credit. Otherwise, two parties with interests adverse to the nonsettling defendant — the plaintiff and the settling defendant — would be empowered to divest the nonsettling defendant of its preexisting right to contribution.[4]

A. If This Court Adopts The Proportionate Credit Rule In *McDermott, Inc.* v. *AmClyde*, Contribution Bar Orders Would Be Permissible In Every Case.

The resolution of the question in this case is quite simple if the Court adopts the proportionate credit rule in *McDermott*, as urged by the United States in that case (see 92-1479 U.S. Am. Br. at 15-18) and by petitioner here (Pet. Br. 17, 19). Because that settlement credit standard fully protects the nonsettling defendant's contribution right, issuance of an order precluding the defendant from asserting a contribution claim would not infringe the interest that the contribution right is designed to protect. Indeed, under that

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[4] This case differs somewhat from the typical situation in which the settlement occurs, and the contribution bar order is entered, in the context of the action instituted by the plaintiff. Here, the plaintiffs' admiralty claim is being litigated in state court but the contribution claim was asserted in the federal limitation action. After petitioner entered into a settlement with the plaintiffs, it received protection against contribution claims in the form of an order issued by the federal district court granting its motion for summary judgment on respondent's contribution and indemnity claims. See Pet. App. A5. That order was in substance the equivalent of a "bar order" precluding a nonsettling co-defendant from asserting contribution claims against the settling defendant. The question here is whether the district court erred in issuing that order.

regime nonsettling defendants would have no incentive to pursue a contribution claim even if a bar order were never entered.

This Court held in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), that "when two or more parties have contributed by their fault" to a maritime tort, "liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault." *Id.* at 411. Accordingly, a party that asserts a contribution claim is entitled to recover from the defendant in contribution the latter's share of the damage based upon "the comparative degree of [its] fault." *Ibid.*

Under the proportionate credit approach, the judgment against the nonsettling defendants (if any) is reduced by the settling defendant's share of the damage, calculated on the basis of the latter's comparative fault. See, *e.g.*, *Leger* v. *Drilling Well Control, Inc.*, 592 F.2d 1246, 1248-1249 (5th Cir. 1979); see also *Franklin* v. *Kaypro Corp.*, 884 F.2d 1222 (9th Cir. 1989) (Section 10(b) action), cert. denied, 498 U.S. 890 (1990). The nonsettling defendants therefore receive in the form of the settlement credit the precise relief that they would be entitled to obtain in a contribution action against the settling defendant. The proportionate credit rule is thus faithful to the principles of comparative fault and, indeed, is more efficient than a system requiring the assertion of contribution claims because it eliminates the need for ancillary contribution litigation in order to accomplish fair apportionment.

Moreover, as the United States' amicus brief in *McDermott* demonstrates (at 11-28), the proportionate credit approach is justified by a number of considerations wholly apart from the contribution bar question. Most fundamentally, that approach is fair. "Settling defendants pay an amount to which they voluntarily agree. The bar on further contribution extinguishes further risk on their part.

Nonsettling defendants never pay more than they would if all parties had gone to trial. This comports with the equitable purpose of contribution." *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1231.

The proportionate credit rule also best reflects the reality of the agreement between the plaintiff and the settling defendant, which absolves the settling defendant of responsibility for paying any subsequent judgment in return for a prescribed amount of compensation. The proportionate credit standard effectively holds the plaintiff to its bargain by directing the finder of fact to identify the proportion of the ultimate judgment that would have been allocated to the settling defendant and then cancelling that portion of the claim.

At the time of settlement, no party knows for sure the size of the verdict (if any) or whether it will survive subsequent judicial review. A decision to settle represents a calculation by the plaintiff that immediate receipt of a certain sum of money is worth more than the possibility of a larger payout later. See *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230 ("[s]ettlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive if a claim were fully litigated") (footnote and citations omitted). As between the plaintiff and a nonsettling defendant, the plaintiff — who controls the final decision whether to settle or force a defendant to trial — properly bears the risk of settling for less than a defendant's proportionate share.

A pro tanto credit, on the other hand, would enable the plaintiff to gain the advantages of settlement — early and certain payment — without the usual tradeoff of a discount on the claim. That is because any discount given to the settling defendant will be made up by the nonsettling defendant. For the same reason, it shifts the entire risk of a bad settlement from the plaintiff to the nonsettling defendant. In cases

involving a single defendant, by contrast, the plaintiff's settlement necessarily *does* involve a compromise of its claim — there is no other defendant to make up the difference.

It is obvious why plaintiffs would support a system that allows them to "have their cake and eat it too," by obtaining all of the advantages of settlement payments while retaining their right to 100% compensation — and subjects joint tortfeasors to legal rules that are considerably more burdensome than those applicable to defendants that bear sole responsibility for a wrong — but there is no policy reason why courts should sanction that patently unfair result.

By shifting the risk of a low settlement to the nonsettling defendant, moreover, the pro tanto rule also encourages collusive settlements in which the plaintiff takes a small amount from one or more defendants (perhaps with the goal of financing further litigation) and proceeds against "deep pocket" defendants in an effort to recover from those defendants far more than their proportionate share. See *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230; *In re Sunrise Securities Litigation*, 698 F. Supp. 1256, 1259 (E.D. Pa. 1988). That is precisely the opposite of what contribution is designed to accomplish.

Because the proportionate credit rule protects the nonsettling defendant's contribution right in full, and most faithfully implements the policies underlying the proportionate fault rule, this Court should adopt that standard in *McDermott*.

B. If This Court Adopts The Pro Tanto Settlement Credit Rule In *McDermott*, Nonsettling Defendants Should Not Be Barred From Maintaining Contribution Actions Against Settling Defendants.

If the Court decides, contrary to our submission, to endorse the pro tanto (dollar-for-dollar) credit rule in

McDermott, it should leave nonsettling defendants free to press contribution claims against settling defendants. Precluding contribution actions would result in manifest injustice to nonsettling defendants, effectively overturning the policy of fair allocation of damages that contribution is designed to implement. Moreover, a contribution bar cannot be justified by speculation that allowing contribution claims will decrease settlements. In striking the balance between the equitable cost-sharing principles of contribution and the policy of encouraging settlements, this Court has already concluded that fair allocation is of paramount interest. See *Reliable Transfer*, 421 U.S. at 408. There is no reason for a different result here. Finally, a "good faith" settlement requirement combined with a contribution bar is not a viable compromise solution.

1. Barring Non-Settling Defendants From Obtaining Contribution From Settling Defendants Would Eviscerate The Contribution Right And Undercut The Fairness And Deterrence Principles Underlying Contribution.

A rule of contribution is in substance a decision that liability should be apportioned among defendants according to a particular standard; in admiralty cases, apportionment is based on the defendants' relative fault. Barring contribution claims will override that apportionment standard, unfairly shifting liability from the settling defendant to the nonsettling defendant.

A simple example illustrates this phenomenon. Assume an action against two defendants — A and B. A settles for $100 and the case proceeds to trial against B. The fact finder at trial finds A 60% responsible for the damage and B 40% liable; the total damages are $1,000. If contribution is permissible, B ultimately will pay only $400 of the $900 owed to the plaintiff (as long as it can collect the $500 in

contribution that it is entitled to obtain from A). If a contribution claim against A is barred because of the settlement, B must pay the entire $900 itself. *By settling with the plaintiff, A has effectively shifted $500 of liability from itself to B.* Of course many cases involve not hundreds of dollars, but potential shifts of millions of dollars of liability from the settling defendant to the nonsettling defendant. Why should the settling defendant be permitted to increase the liability of the nonsettling defendant in this manner?

Creating such a tremendous loophole in the otherwise-applicable apportionment standard is not objectionable simply because it overrides the preexisting contribution rule. Rather, the Court should reject that approach because it threatens the important policies underlying that rule. Thus, as we have discussed, the Court justified the right of contribution in the admiralty context by reference to the basic fairness of ensuring that joint tortfeasors do not pay more than their proper share of the damage. See *Cooper Stevedoring*, 417 U.S. at 111 (contribution leads to "a 'more equal distribution of justice'"); *Reliable Transfer*, 421 U.S. at 411 (goal of "'just and equitable' allocation of damages" can be "more nearly realized" by allocating damages according to relative fault); *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 271-272 n.30 (1979) (contribution "remedies the unjust enrichment of the concurrent tortfeasor"). "'There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer.'" *Heizer Corp.* v. *Ross*, 601 F.2d 330, 333 (7th Cir. 1979) (citation omitted) (Section 10(b) claim).

The Court has also recognized that contribution is necessary to produce an efficient level of deterrence. *Cooper Stevedoring*, 417 U.S. at 111 (where two parties are at fault, contribution serves "[t]he interests of safety" by making both "'more careful'") (quoting *The Alabama*, 92 U.S. 695, 697

(1876)). See also *Great Lakes Dredge & Dock Co.* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, 1582 (11th Cir.) (discussing efficient deterrent effect of contribution), cert. denied, 113 S. Ct. 484 (1992). As one commentary has observed:

> Both moral and economic advantages can be envisaged in the linking of accident costs as closely as possible to their various causes. The burden would be shared more nearly in accordance with moral responsibility, and the various actors would be subjected to economic incentives for safety that reflect the social costs of their activities more realistically than in the absence of contribution.

3 F. Harper, F. James & O. Gray, *The Law of Torts* § 10.2, at 44 (2d ed. 1986). See also Adamski, *Contribution and Settlement in Multiparty Actions Under Rule 10b-5*, 66 Iowa L. Rev. 533, 541 (1981) (discussing fairness and efficiency goals of contribution).

Eliminating the right of nonsettling defendants to seek contribution from settling defendants is wholly inconsistent with both basic fairness and the interest in encouraging an efficient level of deterrence. As the example above illustrates, fairness will be nonexistent because the nonsettling defendant will be forced to pay more than its fair share in virtually every case. By entering into partial settlements, the settling defendant and the plaintiff will be able to do precisely what contribution is designed to prevent — place virtually the entire burden of the loss on one of several joint tortfeasors.[5]

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[5] While the principle of joint and several liability allows the plaintiff to recover all of its damages from a single defendant, this Court's decisions in *Cooper Stevedoring* and *Reliable Transfer* were expressly intended to ameliorate substantially the impact of the plaintiff's choice by empowering defendants to utilize contribution actions to allocate responsibility for paying the judgment among all

A rule that limits a defendant's ability to achieve apportionment on the basis of relative fault also will undercut deterrence because "it would allow guiltier defendants to get off cheaply by settling first." *Donovan* v. *Robbins*, 752 F.2d 1170, 1181 (7th Cir. 1985). Indeed, even petitioner concedes (Br. 20) that a settlement bar "does run afoul of *Reliable [Transfer]* to the extent that the pro tanto setoff may be greater or less than the actual proportionate fault of the settling tortfeasor depending upon whether plaintiff made a good or bad settlement." By permitting contribution bars in this context, therefore, this Court would be endorsing a regime that will increase unfairness and lessen effective deterrence. That outcome is entirely inconsistent with the policies underlying contribution in particular and admiralty law in general.[6]

A settlement bar combined with a pro tanto credit rule would not just eviscerate the concept of apportionment according to parties' relative fault, it also would force the nonsettling defendant to reimburse the plaintiff for the settlement discount obtained by the settling defendant. As we have discussed (see pages 10-11, *supra*), the pro tanto

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defendants according to their relative fault. As we discuss in the text, permitting contribution bar orders will vitiate the positive effects of contribution.

[6] Because this Court has extensive power to "fashion[] the controlling rules" under the general maritime law (*Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963)), there is no doubt that the Court has the power to preclude the assertion of contribution claims against settling defendants if it were to determine that bar orders were appropriate in this context. In the case of statutory contribution rights, by contrast, the Court's power is much more limited and it seems unlikely that the Court could limit the exercise of a contribution right created by Congress. See, *e.g.*, 15 U.S.C. §§ 78i & 78r (provisions of the federal securities laws that include an express contribution right).

rule effectively guarantees the plaintiff the advantages of settlement but insulates it against the claim discount that invariably accompanies a settlement. If the Court determines that this result is appropriate, and adopts the pro tanto credit standard, it surely would be unjust to require the nonsettling defendant to bear the burden of repaying the settlement discount received by the settling defendant. The nonsettling defendant should be permitted to utilize its contribution right to shift the repayment obligation to the party that obtained the discount in the first place — the settling defendant.

Finally, a pro tanto settlement credit combined with a contribution bar would affirmatively encourage settlements that are unfair by design. The plaintiff would have an incentive to team up with one or more defendants, even if they are the most culpable parties, and shift the burden of the loss to remaining defendants with deeper pockets. See *Huddleston* v. *Herman & MacLean*, 640 F.2d 534, 558 (5th Cir. 1981), aff'd in part and rev'd in part on other grounds, 459 U.S. 375 (1983); Uniform Contribution Against Tortfeasors Act § 4 (1955), 12 U.L.A. 99-100 (1975) (describing opportunity for collusion as the driving force behind the 1939 UCATA's allowance of contribution against settling defendants); Restatement (Second) of Torts § 886A cmt. m (1979) (observing that settlement bar opens the door to collusion between plaintiff and the settling tortfeasor).[7]

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[7] Amicus National Association of Securities and Commercial Law Attorneys ("NASCAT") asserts (Br. 12) that "[s]imple economic self interest should ensure that plaintiffs will seldom settle for an unreasonably low payment from a substantially culpable defendant." In fact, economic self-interest is far more likely to lead a plaintiff to seek the largest possible recovery from the wealthiest defendant — and the pro tanto method enables the plaintiff to do just that. See *Rufolo* v. *Midwest Marine Contractor, Inc.*, 6 F.3d 448, 459 (7th Cir. 1993) (Eisele, J., concurring) (under pro tanto rule with a settlement bar, "plaintiff would settle, fairly or unfairly, with the less affluent defendant, knowing that the deep-pocket defendant was available to pick up the tab"), petition for cert. filed, 62 U.S.L.W. 3378 (U.S. Nov. 15, 1993) (No. 93-764).

In sum, every relevant consideration weighs strongly against precluding contribution claims against settling defendants in this context.

2. A Contribution Bar Cannot Be Justified By The Need To Encourage Settlements.

Petitioner (Br. 19) and its amicus (NASCAT Br. 9-12) point to only one reason why contribution bars should be freely available under a pro tanto settlement credit regime: allowing contribution allegedly would discourage settlements. But even if that were true, the interest in encouraging settlement does not outweigh the adverse effects cataloged above.

To begin with, the settlements that would be discouraged by the continued availability of contribution are by definition partial settlements. The judicial system has a reduced interest in settlements of this sort because they do not eliminate the burden on the courts engendered by complex multi-defendant cases. Such cases still will require court time for resolution of pretrial disputes and for the trial itself.

More fundamentally, as we have discussed (see pages 13-14, *supra*), this settlement process would be extremely unfair to nonsettling defendants. As this Court observed in prescribing contribution on the basis of relative fault, "[c]ongestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations." *Reliable Transfer*, 421 U.S. at 408. The Court in *Reliable Transfer* balanced the interests at stake and determined that a rule that effectuates the principle of fair apportionment is preferable to

one that "yields quick, though inequitable, settlements." *Ibid.* The outcome of that balance should be no different in the present context, where the interest in encouraging settlement must be weighed against "the manifest unfairness to non-settling defendants if they are not permitted to seek contribution under the pro tanto approach * * *." 92-1479, U.S. Am. Br. at 10 n.3.

Indeed, the outcome of this process would be the precise situation that contribution was designed to prevent — imposition of unfair and disproportionate liability on one of a number of joint tortfeasors. There is no reason to adopt a legal rule in this case that would return admiralty law to the very situation that this Court's decisions in *Cooper Stevedoring* and *Reliable Transfer* were designed to remedy.[8]

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[8] Amicus NASCAT suggests (Br. 5-7) that the contribution right is inferior to the plaintiff's right to full compensation and that the contribution right therefore cannot be configured in a way that would interfere with settlement. There is no support in this Court's opinions for this rigid hierarchy of rights. The Court clearly determined in *Cooper Stevedoring* and *Reliable Transfer* that contribution based on relative fault was necessary to promote the important values of fairness and deterrence. As the Court's analysis in *Reliable Transfer* demonstrates, those values can in some circumstances outweigh the interest in providing compensation to the plaintiff through the settlement process.

Indeed, if — as NASCAT appears to believe — ensuring compensation for plaintiffs and promoting settlement are the only relevant values, there is no need to stop at contribution bar orders in furthering those goals. Perhaps statute of limitations defenses should be eliminated on the ground that, like contribution, they protect only defendants and therefore must fall before the interest in compensation. Other defenses could meet the same fate. These examples are laughable because no one would suggest altering fundamental rules of litigation in order to increase the pressure to settle. But that is precisely what NASCAT suggests here —

Courts have recognized in other contexts that "our preference for settlement and accord are insufficient to justify the imposition of a decree that infringes upon the rights of third parties." *LULAC* v. *Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (en banc), petition for cert. filed, 62 U.S.L.W. 3321 (U.S. Oct. 21, 1993) (No. 93-630); see also *Martin* v. *Wilks*, 490 U.S. 755, 768 (1989). The same conclusion is appropriate here.

Although a contribution bar combined with the pro tanto approach should be rejected for the reasons discussed above, allowing contribution obviously would not be an optimal solution if it in fact would discourage settlements. But that

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overriding the contribution regime devised by this Court in *Cooper Stevedoring* and *Reliable Transfer* — and defendants' rights under that regime — in order to promote settlements.

NASCAT also attempts to justify its approach by pointing to *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), and asserting that the inherent unfairness of a pro tanto rule is justified by the principle that the plaintiff must receive a full recovery even if a nonsettling defendant ends up paying more than its proportionate share. *Edmonds*, however, provides no support for that position. As the United States discusses in detail in its amicus brief in *McDermott* (at 26-28), that was a case in which a longshoreman was injured by the negligence of his stevedore-employer and a shipowner. The Court concluded that the shipowner was required to pay all the damages assessed at trial, because the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, limited the plaintiff's recovery from his employer to statutorily-defined benefits. See 443 U.S. at 264-266, 268. In the present context there is no such statutory constraint on the plaintiff's action against any tortfeasor, and any reliance on *Edmonds* is therefore misplaced. Accord *Associated Electric Coop., Inc.* v. *Mid-America Transp. Co.*, 931 F.2d 1266, 1271 (8th Cir. 1991); *Kizer* v. *Peter Kiewit Sons' Co.*, 489 F. Supp. 835, 838-840 (N.D. Cal. 1980).

tradeoff is illusory and unnecessary, because the other alternative — the proportionate share credit rule — both promotes fairness and effective deterrence and, by permitting contribution bars, would allow defendants to terminate completely their involvement with the litigation. See *Donovan*, 752 F.2d at 1181.

3. The Objections To A Contribution Bar Cannot Be Overcome By Conditioning The Bar On A Judicial Finding That The Settlement Was Made In "Good Faith."

Some have suggested that the unfairness of a contribution bar can be mitigated by requiring a finding that a settlement was made in "good faith" before a court may issue a contribution bar. See, *e.g.*, *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1317 (7th Cir. 1992); *Miller* v. *Christopher*, 887 F.2d 902, 907 (9th Cir. 1989); Restatement (Second) of Torts § 886A cmt m (1979); NASCAT Br. 12-13. That approach is unworkable as a matter of both theory and practice.

To begin with, the "good faith" standard is extremely murky. If that test is meant to identify only instances of collusive settlements, it would not remedy the other types of unfairness inherent in the contribution bar approach, principally the shifting of liability from settling defendant to nonsettling defendant and resulting interference with the principles of fairness and appropriate deterrence.

To the extent the test is meant to determine whether the settlement is "fair" to the nonsettling defendant because it does not shift liability from the settling defendant to the nonsettling defendant, "'A good faith hearing 'means bogging down the settlement process in a miniature trial before trial.' In order to be truly efficacious, the good faith hearing would require a full evidentiary hearing on all of the parties' relative culpabilities. This would negate many of the benefits of settlement." *Franklin* v. *Kaypro Corp.*, 884 F.2d at 1230

(quoting *Donovan*, 752 F.2d at 1181). See also Adamski, *supra*, at 549-550. The court also would have to consider the possible size of the verdict, the strengths and weaknesses of the parties' cases, the risks of trial, and myriad other factors.

Simply to describe this undertaking is to demonstrate its impracticality. A district court would never be able to make the sort of precise determination necessary to cabin the discretion of the plaintiff and settling defendant and thereby effectively protect the nonsettling defendant.

Furthermore, the possibility that the district judge might be required merely to "estimate[] a range of potential liability" that would satisfy the good faith requirement (*Miller*, 887 F.2d at 907) illustrates the ineffectiveness of the "good faith" solution. While this more relaxed approach might reduce the cost of the evaluation, it also would eliminate virtually all protection for the nonsettling defendant, allowing judges to approve very low settlements that would shift large amounts of liability from the settling defendants.

The proportionate credit approach is a much more efficient way to achieve what the good faith hearing is intended to do — ensure that the nonsettling defendant's liability is not increased as a result of the deal between the plaintiff and the settling defendant. The Court should adopt the proportionate credit rule in order to provide an appropriate framework for settlements that will safeguard the rights of all participants in the settlement process.

CONCLUSION

If this Court holds in *McDermott, Inc.* v. *AmClyde*, No. 92-1479, that the settlement credit should be equal to the settling defendant's proportionate share of the liability, the judgment of the court of appeals should be reversed. Otherwise, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Of Counsel:

JON N. EKDAHL
General Counsel
Arthur Andersen & Co.

HARRIS J. AMHOWITZ
General Counsel
Coopers & Lybrand

HOWARD J. KRONGARD
General Counsel
Deloitte & Touche

EDWIN D. SCOTT
General Counsel
KPMG Peat Marwick

ELDON OLSON
General Counsel
Price Waterhouse

KATHRYN A. OBERLY*
Associate General Counsel
CARL D. LIGGIO
General Counsel
Ernst & Young
1200 Nineteenth Street, N.W.
Washington, D.C. 20036
(202) 663-9871

* *Counsel of Record*

DECEMBER 1993